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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 464

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Statement of Basis Upon Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Order Appealed From as Required by Supreme Court Rule 12.

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Statement of Basis Upon Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Order Appealed From as Required by Supreme Court Rule 12.

Pursuant to Supreme Court Rule 12, paragraph 1, the above appellant files this its statement particularly disclosing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the order and decision appealed from herein as follows:

I. The statute believed to sustain appellate jurisdiction in Section 1257(2) of Title 28 of the United States Code, which provides that final judgments or decrees rendered by the highest court of the state in which a decision could be had may be reviewed by the Supreme Court by appeal

where there is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

II. The order and decision appealed from were entered on the 2nd day of August, 1951, as appears from the certified copy of the minute order of the Supreme Court of the State of California dated August 2, 1951, on file with the clerk of said Supreme Court, and as set forth in 37 Adv. Cal. (minutes) p. (1). A copy of said order and decision is attached hereto as Appendix A. Under the practice of the State of California an order of the Supreme Court of the State of California denying a petition for a writ of review to review and annul an order of the Public Utilities Commission of the State of California amounts to an affirmation of such order and decision.

III. The application for an appeal was presented on the ..... day of October, 1951, as appears from the certified copy of the Order Allowing Appeal, on file with the Clerk of the Supreme Court of California.

IV. The appeal herein is from an order and decision of the Supreme Court of the State of California in a civil case denying appellant's petition for a writ of review, to review and annul an order and decision of the Public Utilities Commission of the State of California (a copy of which is attached hereto as Appendix B), thereby affirming the order and decision of said Commission, by which said Commission (1) held that appellant is subject to the regulatory authority of said Commission with respect to appellant's rates, fares and charges for transportation within the State of California, (2) ad-

jured and admonished appellant that it could not raise any rate or charge for the transportation of passengers and property in intrastate commerce between points within the State of California under any circumstances whatsoever except upon a showing before said Commission that such increase is justified, and (3) ordered that appellant should make reparation of certain fares to certain passengers who had been transported by it, as appears from pages 13 and 14 of the certified copy of the Opinion and Order (Decision No. 45624) of the Public Utilities Commission of the State of California in Case No. 5271 bearing date of April 24, 1951, said Opinion and Order being on file with the Clerk of said Public Utilities Commission. It is to be noted that said Opinion and Order do not constitute portions of the record on file with the Clerk of the Supreme Court of the State of California by reason of the fact that, under the practice of said state, in an original proceeding for writ of review the record of the inferior tribunal with respect to whose action review is sought does not become a part of the record of the reviewing court; nevertheless, since the Supreme Court of the State of California did not issue an opinion in connection with its affirmation of the Opinion and Order of the Public Utilities Commission, appellant respectfully submits that a certified copy of the Opinion and Order of said Commission should be presented to the Supreme Court of the United States in order that the basis of the decision of the Supreme Court of the State of California may be made apparent.

V. Appellant, a corporation organized and existing under the laws of the State of Delaware, is and for many years past has been engaged in the transportation by air of persons, property and United States mail for hire, pur-

suant to certificates of public convenience and necessity issued to it by the Civil Aeronautics Board of the United States under the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401 *et seq.*). Under said certificates, appellant has conducted, and now conducts, air transportation services between the east and west coasts of the United States, along the west coast of the United States from San Diego, California, to Vancouver, British Columbia, and from the west coast of the United States to the Hawaiian Islands. As a part of its operations along the west coast of the United States, appellant furnishes transportation services under said certificates of public convenience and necessity between the Los Angeles area and the San Francisco bay area. Appellant operates, and at all time herein concerned has operated, a standard service, and, in addition thereto, an air coach service at rates substantially lower than those charged in its standard service. At the time in question herein, appellant operated, among other flights, four daily round trip air coach flights between Los Angeles and the San Francisco bay areas and one daily round trip air coach flight between the Los Angeles area and Seattle, Washington, via the San Francisco bay area. Appellant is authorized to transport United States mail on all of such flights and regularly transports and has transported such mail on such flights. Many passengers transported by appellant on such air coach flights between the Los Angeles and San Francisco bay areas are persons engaged in making interstate voyages.

Prior to March 1, 1951, the fare charged by appellant for one-way adult transportation in its air coach service between the Los Angeles and the San Francisco bay areas (whether in aircraft operating only between the Los An-

geles and San Francisco bay areas or in aircraft operating between the Los Angeles area and Seattle, Washington, via the San Francisco bay area) was the sum of $9.95, exclusive of Federal transportation tax. On or about February 5, 1951, appellant received a letter from the Chairman of the Civil Aeronautics Board of the United States advising it that said Board had investigated the financial results of appellant's operations at the rate of $9.95 and was of the opinion that such rate was economically unsound. The Chairman of said Board requested appellant to raise its rate and recommended a new rate of $11.70, exclusive of tax. Accordingly, appellant filed and published its tariff pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended, and the Economic Regulations of the Civil Aeronautics Board, raising its fare from $9.95 to $11.70, effective March 1, 1951. On or about February 9, 1951, appellant filed with appellee, Public Utilities Commission of the State of California, its application for approval of the proposed increase in fare. On March 1, 1951, appellant placed the increased fare in effect pursuant to its tariff duly published and filed under the Civil Aeronautics Act of 1938, as amended. At that date, its application filed with appellee had not been acted upon. On or about March 6, 1951, appellee issued its order instituting investigation in Case No. 5271, ordering an investigation into the fares, rules, regulations, charges, services, operations and practices of appellant and others, with particular reference to the fare charged by appellant and others for the transportation of passengers between the San Francisco bay area and the Los Angeles area in air coach service. Hearings were conducted by appellee on March 14 and March 27, 1951, at which appellant appeared and presented oral and written evidence and oral

argument, and thereafter filed briefs with appellee. On April 24, 1951, appellee issued its opinion and order, referred to in paragraph IV hereof (Appendix B hereto), and on May 15, 1951, denied appellant's petition for rehearing duly filed with appellee. On June 14, 1951, appellant filed in the Supreme Court of the State of California its petition for writ of review to review and annul said order and opinion of appellee, as provided by the laws of the State of California, and following the filing of additional pleadings and briefs by appellant and appellee, the Supreme Court of the State of California, on August 2, 1951, made and entered its order denying appellant's petition for such writ of review (Appendix A hereto). No procedure being provided under the laws of the State of California for the filing of a petition for rehearing in a matter of such nature, none was filed by appellant.

VI. The grounds upon which it is contended the questions involved are substantial are, among others, that there exists a direct conflict between the federal government and the State of California as to jurisdiction concerning economic regulation of appellant's operations within the State of California, the administrative agencies of both governments having asserted jurisdiction over appellant. The conflict which exists is exemplified by the situation present in the instant matter, as more fully set forth in paragraph V hereof. Briefly stated, as of March 1, 1951, the Civil Aeronautics Board of the United States authorized appellant to increase its fare for certain transportation of passengers within the State of California from $9.95 to $11.70, and appellant put such increased fare into effect on said date. As of May 9, 1951, appellee, Public Utilities Commission of the State of California, holding that it had jurisdiction over appellant and such increase to

have been unlawful in that it had not been previously approved by said Commission, ordered appellant to make reparation wherever possible of fares charged by it in excess of $9.95 during the period between March 1, 1951, and May 9, 1951.

This case involves an important question of Federal law which has not been, but should be, settled by this Court. This Court has never decided the question of whether or not an air carrier holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board of the United States, pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401 *et seq.*) is subject to the regulatory control, with respect to its rates, fares and charges, of a state in which a portion of its operations are conducted. Among the factors which distinguish this matter from others which, on their face, might appear to involve similar questions are the fact that the intrastate and interstate operations of appellant are interwoven to such a degree that it is not possible to regulate one without directly impinging upon and regulating the other. This is an area in which uniformity in regulation is essential. (*People v. Gook*, 69 S. C. 841 at 842-843; 336 U. S. 725.) Furthermore, the United States has assumed an obligation under the Civil Aeronautics Act of 1938, as amended, through the medium of compensation for the transportation of mail, to place such carriers in such financial position as to insure the performance of the mail transportation service and to enable such carriers to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the National Defense (52 Stat. 998, 49 U. S. C. 486(b)), there-

by excluding the states from the regulation of such carriers. The matter at issue is, therefore, of utmost importance not only to the entire air transportation industry of the United States but also to each state which may have attempted, or may intend to attempt, to impose such regulation upon air carriers operating within its boundaries.

VII. The cases believed to sustain the jurisdiction are as follows:

(a) The Supreme Court of California is the only court of that state which has authority to review orders of the Public Utilities Commission of that state. Therefore, the decision of the Supreme Court of California is a final judgment or decree of the highest court of the state in which a decision may be had.

Public Utilities Act, Section 67 (Deerings General Laws, Act 6386).

(b) The denial by the Supreme Court of California of appellant's petition for a writ of review to review and annul the order and decision of the Public Utilities Commission is a decision affirming said order and decision.

Funeral Directors Association v. Board of Funeral Directors, 22 Cal. 2d 104;

McDonough v. Garrison, 68 Cal. App. 2d 318;

Napa Valley Electric Company v. Railroad Commission of the State of California, 251 U. S. 310 (the name "Public Utilities Commission" was substituted for "Railroad Commission" by amendment of Article XII, Section 22, of the California Constitution in 1946);

Adams v. Decoto, 21 F. 2d 221.

(c) The provisions of a state constitution are "statutes" within the meaning of 28 U. S. C. 1257 (2).

Lincoln Federal Labor Union, No. 19129 v. Northwestern Iron and Metal Co., 335 U. S. 525;

Adamson v. California, 332 U. S. 46.

(d) Orders of State commissions or administrative bodies exercising delegated legislative authority are "statutes" within the meaning of 28 U. S. C. 1257(2).

Lake Erie and Western Railroad Company v. State Public Utilities Commission of Illinois, 249 U. S. 422;

Bluefield Water Works and Improvement Company v. Public Service Commission of the State of West Virginia, 262 U. S. 679;

Northern Pacific Railway Company v. Department of Public Works of Washington, 268 U. S. 39;

Live Oak Water Users' Association v. Railroad Commission of the State of California, 305 U. S. 354;

Sultan Railway & Timber Company v. Department of Labor and Industries, 277 U. S. 135.

VIII. The federal questions sought to be reviewed were raised before the Public Utilities Commission of the State of California, orally before said Commission in the course of the hearings conducted by it leading up to the order and decision affirmed by the Supreme Court of California; in appellant's brief submitted to said Commission prior to the issuance of its said order and decision, in appellant's petition for rehearing submitted to said Commis-

sion following the issuance of its said order and decision, in appellant's petition to the Supreme Court of the State of California for a writ of review to review and annul said order and decision, and in appellant's reply to the answer of said Commission opposing appellant's petition to the Supreme Court of the State of California for a writ of review. Said Public Utilities Commission denied the validity of appellant's contentions with respect to said federal questions, and the Supreme Court of the State of California, by its denial of appellant's petition for writ of review, under the practice of the State of California, affirmed said holding of said Commission. The following quotations of specific portions of the record support appellant's assertion that the ruling of said Court was of a nature to bring the question within the statutory provision believed to confer jurisdiction upon the Supreme Court:

1. Reporter's Transcript of proceedings before the Public Utilities Commission of the State of California in Case No. 5271, March 14, 1951, and March 27, 1951:

> "Mr. Stearns [counsel for appellant]: If this is the appropriate time, before you proceed, I should like to make a statement as to the position of United Lines [*sic*], in connection with the proceeding, if that is permissible." [Tr. Vol. I, p. 7, lines 1-4, incl.]
>
> ". . . Number one, that the Congress of the United States is [*sic*] pre-empted to feel [*sic*] an economic relation [*sic*] as far as air carriers such as United are concerned by the Civil Aeronautics Act of which I think we are all familiar. I don't need to recite portions of it. Congress has pre-empted this field and therefore has exclusive jurisdiction." [Tr. Vol. I, p. 8, lines 10-15.]

"Mr. Stearns: On the basis of that understanding, I will withdraw my objection to the language of the order because I don't want to be technical about that but I would like to reserve the right to secure an extension of time and also to continue in force our legal objections made earlier." [Tr. Vol. I, p. 24, line 25, to p. 25, line 3, incl.]

"Mr. Stearns: Before I call our witness, I would like to make or reiterate the fact that we do not waive our legal objections in this proceeding by taking part in it. I know that is a difficult position to be in and I think the Examiner recognizes that we are in that position. I wish to restate the objections I made before as to [*sic*] the matter of economic regulation of carriers such as United is guided solely by the Civil Aeronautics Act and that in any event this Honorable Commission has not been endowed with the jurisdiction that is required, permitted to regulate United Air Lines, Incorporated economically." [Tr. Vol. II, p. 74, line 24, to p. 75, line 8, incl.]

2. Memorandum in Opposition to Motion for Preliminary Order and Brief of Respondent, United Air Lines, Inc., filed with the Public Utilities Commission of the State of California on behalf of appellant on April 4, 1951, in Case No. 5271:

"UNITED'S OPERATIONS ARE INTERSTATE IN NATURE.

"United's operations in question here are interstate. Assuming merely for the sake of argument that the Commission has the authority to regulate the rates and charges for the transportation of persons and property by air between points entirely within the State of California, the unrebutted evidence

produced by United at the hearing is that the Los Angeles-San Francisco air coach flights carry a substantial number of interstate passengers. The fact that the airplanes involved in transporting such passengers may operate, on particular flights, only within the limits of the state cannot make the transportation anything other than interstate in nature. If a passenger desires to travel, for example, from Seattle to Los Angeles, the fact that he may change planes at San Francisco while en route has no effect on the interstate nature of his journey nor of the transportation of such passenger. Therefore, from that point of view alone, it is obvious that the Commission has no power of economic regulation with respect to the air coach service in question, and any attempt to regulate the same would constitute an unauthorized interference with interstate commerce and would violate the Constitution of the United States.

"Some of the aircraft in the Los Angeles-San Francisco air coach service operate interstate: that is, these aircraft originate in Los Angeles and fly to Seattle and return. Here, then, not only are a number of passengers transported between Los Angeles and San Francisco actually engaged in an interstate voyage, but the very vehicles themselves are so engaged. There can be no argument whatsoever but that under these circumstances the transportation is interstate, and, of course, the Commission cannot regulate the fares charged for any portion of the voyage. Therefore, United is at liberty, subject to the approval or disapproval of the Civil Aeronautics Board, to charge such fares as it may deem desirable between Los Angeles and San Francisco, in the case of the aircraft which operate between Los Angeles and Seattle. Can it be seriously maintained that any

real distinction results merely because in some instances interstate passengers change planes at San Francisco? Even if it be assumed that the Commission has some regulatory authority, where the aircraft operate entirely within the state, can United be logically required to charge some lesser fare on aircraft shuttling between Los Angeles and San Francisco than it does on aircraft operating between Los Angeles and Seattle, where the service rendered between Los Angeles and San Francisco is identical in both cases?

"CONGRESS HAS PRE-EMPTED THE FIELD OF ECONOMIC REGULATION WITH RESPECT TO AIR CARRIERS SUCH AS UNITED.

"The Civil Aeronautics Act of 1938, Section 1(2), defines 'air carrier' as any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. Section 1(10) defines 'air transportation' as interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. 'Interstate air transportation' is defined by Section 1(21) of the Act as the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, *inter alia*, a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. Section 403 of the Act provides that every air carrier shall file with the Civil Aeronautics Board and print and keep open to public inspection tariffs showing all rates, fares and charges for air

transportation between points served by it, and no air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation than the rates, fares and charges specified in its currently effective tariffs. The Civil Aeronautics Board has power to enforce these provisions, by judicial action if necessary. An examination of the above-mentioned provisions of the Civil Aeronautics Act indicates that United, even as to its Los Angeles-San Francisco operations, is an 'air carrier' engaged in 'air transportation,' and, therefore, under the exclusive regulatory control of the Civil Aeronautics Board. First of all, it should be noted that insofar as the Act includes the transportation of mail within the definition of air transportation, there is no requirement that such transportation of mail be interstate. It is, in fact, *any* transportation of mail by aircraft. It having been established at the hearing that United transports mail on the air coach service in question, it follows as a matter of course that in such service United is engaged in air transportation as defined in the Civil Aeronautics Act. In addition, since United transports interstate passengers on its air coach flights, it is engaged in air transportation under the Act from that point of view. Such carriage comes within the definition of interstate transportation, as mentioned above. Note that to come within the definition of interstate air transportation, there is no requirement that the aircraft itself cross state lines. The requirement is merely that the *carriage* by aircraft be between points in more than one state, or between points in the same state where part of the journey is outside of the state. Therefore, the carriage by United of passengers from Los Angeles to Seattle with a change of

aircraft at San Francisco is as much interstate air transportation as when they are carried in a through aircraft between such points of origin and destination.

"Congress having pre-empted the field of economic regulation with respect to all of United's operation, the State of California is precluded from entering such field." (Memorandum, pp. 3-7, incl.)

3. Petition for Rehearing filed on behalf of appellant with the Public Utilities Commission of the State of California in Case No. 5271 on May 5, 1951:

"1. Petitioner reiterates and urges a reconsideration of the points and arguments made by it in its Memorandum in Opposition to Motion for Preliminary Order and Brief of Respondent dated and filed herein on April 4, 1951, and incorporates herein said Memorandum and Brief as fully as if set forth herein verbatim." (Petition for Rehearing, p. 1.)

"5. With respect to the matter of the pre-emption of economic regulation of air carriers by the Congress of the United States, the opinion of the Honorable Commission disposes of the matter with one brief sentence; namely: 'The Civil Aeronautics Act does not purport to extend economic regulation to intra-state transportation of persons and property other than mail.' It is significant that no authority is cited in support of this proposition, and we respectfully submit there is no such authority. As pointed out in respondent's brief on file herein, under the Civil Aeronautics Act of 1938, an air carrier is any citizen of the United States engaging in air transportation, and air transportation includes, among

other things, the transportation of mail by aircraft. Therefore, since respondent, United Air Lines, Inc., transports mail in the operations which are the subject of the investigation conducted by the Commission, it is an air carrier under the Civil Aeronautics Act. This being so, it is bound to file with the United States government, print and publish tariffs showing *all* rates, fares and charges for air transportation between points served by it, and to abide by such tariffs (Civil Aeronautics Act, section 403). Rates for transportation of mail are treated entirely separately in the Civil Aeronautics Act (see section 406). Certainly the interpretation placed upon the Civil Aeronautics Act by the Civil Aeronautics Board is entitled to considerable weight, and, as the record in this matter shows, that Board has not only permitted tariffs to be filed covering the Los Angeles-San Francisco air coach rate, but has, in effect, dictated what that rate should be.

"6. The opinion of the Commission ignores certain other points made by respondent in its brief; namely, that a large part of the transportation conducted by respondent, United Air Lines, Inc., in its air coach operations between Los Angeles and San Francisco is interstate, and that for that reason alone the rates cannot be controlled by this Honorable Commission. In this connection the Honorable Commission's attention is invited to the opinion of the Attorney General of the State of California, No. 51/47, dated April 6, 1951. That opinion is, in effect, an analysis of section 22 of Article XII of the Constitution and the *Short Line* and *Martinez* cases, *supra*. In other words, it discusses for the most part the same authorities discussed in the opinion of the Honorable Commission in this case in respect of

the question as to whether or not the Commission has constitutional authority to regulate the rates of respondent, United Air Lines, Inc. It is interesting to note that the opinion of the Attorney General, following an analysis of the authorities cited, is that the Commission has 'authority to regulate the rates of *intra-state* air carriers.' (Emphasis supplied.) There is no indication in that opinion that the Commission has such authority with respect to *interstate* air carriers, such as respondent, United Air Lines, Inc. Whether or not the opinion of the Attorney General be sound; it certainly raises an inference that the Commission has no authority over the rates of interstate air carriers." (Petition for Rehearing, pp. 3-5, incl.)

4. Petition for Writ of Review With Memorandum of Points and Authorities in Support Thereof filed in the Supreme Court of the State of California on June 14, 1951, in proceeding S. F. No. 18426:

"Annulment thereof [the order of the Public Utilities Commission above referred to] is sought herein upon the following grounds:

* * * * * * * *

"2. That said order is violative of the Constitution of the United States . . ." (Petition for Writ of Review, p. 8.)

"The United States Has Assumed Exclusive Control of the Rates of Air Carriers.

"The United States Congress has preempted the field of regulation of petitioner's rates, fares and charges, and has thereby removed such matters from the scope of the state regulation. Petitioner is an

air carrier engaged in air transportation, and. as such, all of its rates, fares and charges are subject to the approval or disapproval only of the Civil Aeronautics Board of the United States, and such Board has exercised its authority thereupon.

Civil Aeronautics Act of 1938 (49 U. S. C. 401, 403, 405);

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314;

Kansas City etc. Ry. Co. v. Daniel, 180 F. 2d 910.

"Respondent's Order Unlawfully Interferes With Interstate Commerce.

"Respondent's attempted regulation of petitioner's rates, fares and charges is an unwarranted and illegal interference with interstate commerce. The unrebutted evidence before respondent, which respondent has ignored in its findings, is that petitioner, in its operations which respondent seeks to control, transports persons, property and mail in interstate commerce, by means of aircraft operating not only on intrastate flights but on interstate flights as well.

Constitution of the United States, Article I, Section 8;

Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 544." (Memorandum of Points and Authorities accompanying Petition for Writ of Review, pp. 33-34.)

"Respondent Seeks to Deprive Petitioner of Property Without Due Process.

"Since respondent has no jurisdiction over petitioner, its purported order requiring petitioner to

make reparation unconstitutionally deprives petitioner of its property without due process.

Constitution of the United States, 14th Amendment, Sec. 1." (Memorandum of Points and Authorities accompanying Petition for Writ of Review, p. 37.)

5. Reply to Answer of Respondent, Public Utilities Commission, filed by appellant in the Supreme Court of the State of California on July 13, 1951:

"Respondent, at page 14 of its answer, launches into its argument with respect to the question of federal occupancy of the field of economic regulation of air transportation. As might well be expected, respondent relies principally on precedents having to do with the regulation of surface carriers. In this, respondent fails to recognize certain fundamental differences between that field and the regulation of air carriers. (It should be noted in passing that the decision in *Alabama Public Service Commission v. Southern Ry. Co.*, 95 L. Ed. Adv. Op. 708, cited by respondent, was based in part on an express statutory reservation to the states, in the Interstate Commerce Act, 49, U. S. C. 1(17(a)), of the right to control intrastate services of interstate rail carriers. No such reservation appears in the Civil Aeronautics Act of 1938 (49 U. S. C. 401, *et seq.*). This distinction not only deprives the *Alabama Public Service Commission* case, *supra*, of any significance insofar as it relates to respondent's position, but in fact lends support to petitioner's contention that Congress, through the Civil Aeronautics Act, intended to preempt the field of air carrier regulation in its entirety. Additionally, and to the same effect, the Interstate Commerce Act expressly exempts from its applica-

tion, transportation 'wholly within one state' (49 U. S. C. 1(2)), whereas no comparable provision appears in the Civil Aeronautics Act. See, also, *Panhandle, etc. Co. v. Michigan Pub. Serv. Com.*, 95 L. Ed. Adv. Op. 673, wherein the express statutory reservation to the states in the National Gas Act (15 U. S. C. 717) motivated the court to hold that Congress had occupied only a part of the field.

"When Congress enacted the Interstate Commerce Act, it was dealing with an established form of transportation, and its primary purpose was to regulate (*I. C. C. v. Baltimore, etc. Ry. Co.*, 145 U. S. 265, 36 L. Ed. 699; *Harriman v. I. C. C.*, 211 U. S. 407, 53 L. Ed. 253). But, in 1938, when the Civil Aeronautics Act was adopted, Congress sought principally to foster and develop a form of transportation which had then barely begun to be recognized by the public. Regulation was merely incidental to this primary purpose. To this effect, it set forth in the act a declaration of policy (49 U. S. C. 402), reading as follows:

" 'In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

" '(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

" '(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such trans-

portation, and to improve the relations between, and coordinate transportation by, air carriers;

"'(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair and destructive competitive practices;

"'(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"'(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"'(f) The encouragement and development of civil aeronautics.'

Again, the purpose of Congress clearly appears in section 301 of the Act (49 U. S. C. 451):

"'The Administrator is empowered and directed to encourage and foster the developments of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator and the Air Safety Board shall cooperate with the Authority in the administration and enforcement of this Act.'

One important method which Congress chose in order to encourage and foster air transportation was to provide for the fixing, by the Civil Aeronautics Board, of rates to be paid by the Post Office Department for transportation of mail by air. In fixing such rates, the Board was instructed to consider, *inter alia*, 'the need of each . . . air carrier for

compensation for the transportation of mail sufficient . . . together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense.' (49 U. S. C. 486.)

"We respectfully submit that the foregoing citations from the Civil Aeronautics Act of 1938 clearly demonstrate that:

"1. Congress has occupied and intended to occupy, the entire field of economic regulation of air transportation; and

"2. The Congressional purposes, as expressed in the Act, would be wholly incapable of fulfillment were regulation of petitioner's rates not confined to a single agency; namely, the Civil Aeronautics Board. It can scarcely be assumed that Congress would have charged that agency with the duty of fixing rates for the transportation of mail by air, obliging it to take into account the various factors set forth in section 486, *supra*, including the needs of the carriers in the light of *all other revenue of the carriers*, and at the same time have left the way clear for forty-eight separate state commissions to determine what a substantial part of those revenues should be. We should not consider Congress to have been so naive as to create a device whereby the states could require the carriers to furnish services at whatever rates they might see fit, letting the federal government 'make up the difference.' The obligations imposed by the Act of necessity carry with them the right to regulate completely.

"As further evidence of the fact that Congress intended to control intrastate as well as interstate operations of air carriers, it is interesting to note that in section 401 of the Civil Aeronautics Act (49 U. S. C. 481(e)), which section provided for the issuance of 'grandfather' certificates to existing air carriers, Congress saw fit to direct the Civil Aeronautics Authority (now the Civil Aeronautics Board) to issue such certificates with respect to certain wholly intrastate operations, there having been some doubt as to whether or not the general 'grandfather' provisions would cover such operations. Said section reads in part as follows:

" 'If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which airmail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Authority shall, nothwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and *all other classes of traffic for which authorization is sought,* between such points, namely . . . from Bismarck, North Dakota, to Minot, North Dakota, . . . from Detroit, Michigan, to Sault Sainte Marie, Michigan, . . . from Brownsville, Texas, . . . to San Antonio, Texas, . . .' (Emphasis supplied.)

"Furthermore, it would appear that the interpretation placed upon the Civil Aeronautics Act of 1938 by the Civil Aeronautics Board, which is the agency charged with its implementation and enforcement, is entitled to considerable weight. As pointed out in the petition herein, petitioner's rate of $11.70 between

Los Angeles and San Francisco was virtually 'dictated' by the Civil Aeronautics Board. On several occasions said Board has issued certificates of public convenience and necessity for the transportation of passengers, property and mail in wholly intrastate operations. The most recent of these was a certificate of public convenience and necessity issued by the Board on July 11, 1951, to Los Angeles Airways authorizing the inauguration of a helicopter *passenger service* between Pasadena and Los Angeles. Los Angeles Airways has operated, and under said certificate will operate, exclusively in Southern California."

(Reply to Answer of Respondent, Public Utilities Commission, pp. 6-11.)

Respectfully submitted,

.....

OSCAR A. TRIPPET,

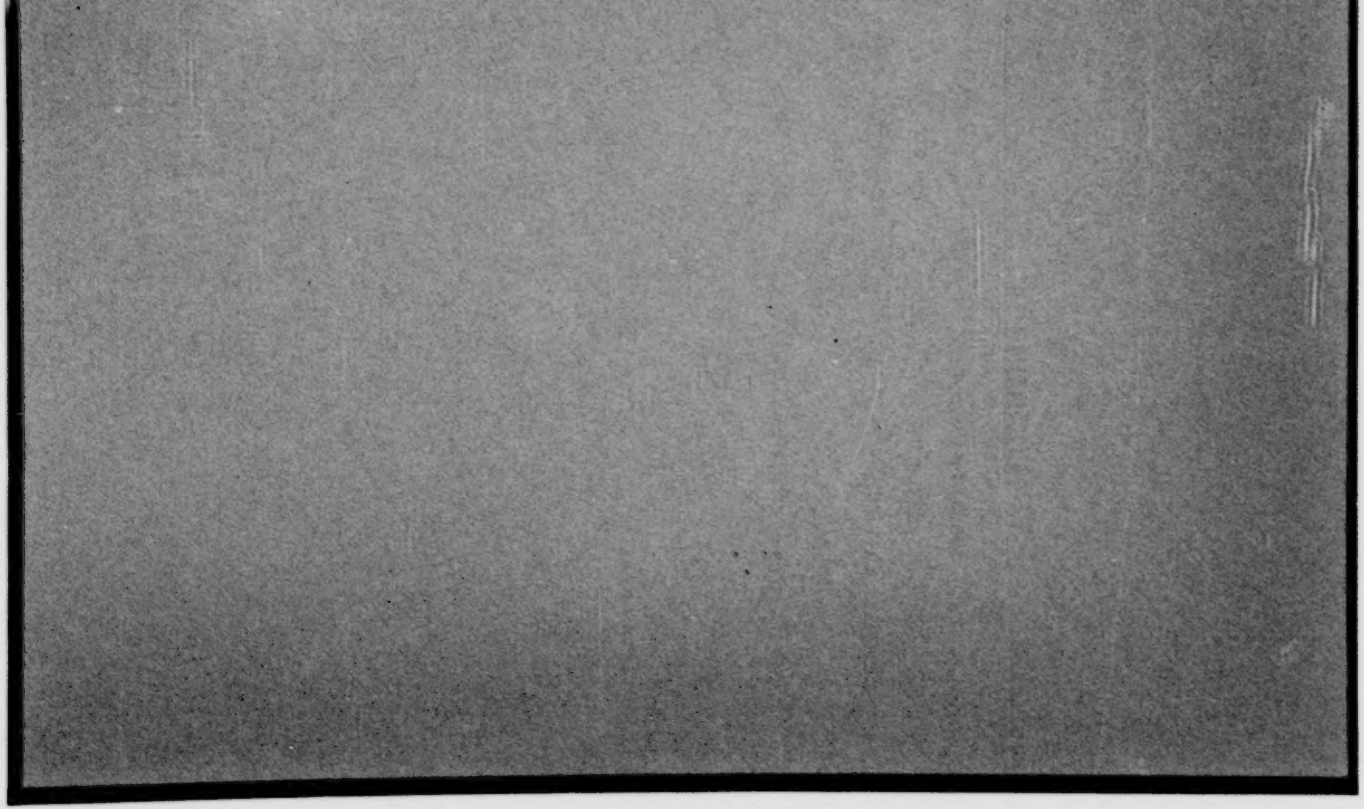
Attorney for Appellant.

PAUL M. GODEHN,
JOHN T. LORCH,
EDMUND A. STEPHAN,
Of Counsel.

Service of a copy of the above statement is hereby admitted the ..... day of ....., 1951.

.....

Attorney for Appellee.



APPENDIX A.

Petition for Writ of Review Denied in re S. F. No. 18426, United Air Lines, Inc., petitioner, v. Public Utilities Commission of the State of California, respondent. August 2, 1951.

CALIFORNIA SUPREME COURT

APPENDIX B.

Decision No. 45624.

Before the Public Utilities Commission of the State of California.

Investigation into the fares, rules, regulations, charges, services, operations and practices of Arrow Airways, Inc.: California Central Airlines; Kenneth G. Friedkin, doing business as Pacific Southwest Airlines; Robin Airways, Inc.; Southwest Airways Company; Transcontinental & Western Air, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc. Case No. 5271.

APPEARANCES

Ray E. Costello, for Southwest Airways Company, respondent,

Donald Keith Hall and D. P. Renda, for Western Air Lines, Inc., respondent,

Kenneth G. Friedkin, for Pacific Southwest Airlines, respondent,

John W. Preston, Jr., for California Central Airlines, respondent,

Charles Stearns, for United Air Lines, Inc., respondent.

David G. Shearer, for Trans World Airlines, Inc., respondent,

Norman D. Kessler, for Robin Airways, Inc., respondent,

Wilson E. Cline, C. H. Jacobsen and Thomas A. Hopkins, for the staff of the Public Utilities Commission of the State of California.

Opinion

This proceeding is an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the transportation of passengers between the San Francisco Bay area and the Los Angeles area.

Public hearings were held before Commissioner Craemer and Examiner Bryant at Los Angeles on March 14 and 27, 1951. Briefs have been filed. The matter is ready for decision.

This investigation was instituted by the Commission upon receipt of information that fares were being assessed for so-called "coach" transportation in excess of those named for such service in the tariffs on file with the Commission. The eight air carriers maintaining published fares between the San Francisco and Los Angeles areas were made respondents.

Factual evidence was offered by representatives of various of the carriers and by members of the Commission's staff. The record shows that certain of the respondents are not offering the coach services with which this investigation is primarily concerned. Arrow Airways, Inc., is no longer operating common carrier service of any nature, and has requested that the tariff which it heretofore filed for California operations be cancelled.[1] Similarly, a member of the Commission's staff testified that the operations of Robin Airways have been suspended or discontinued. Southwest Airways Company and Trans World Airlines, Inc., (formerly Trans-

[1]Exhibit No. 6.

continental & Western Air, Inc.) have no coach operations between California points, and there is no evidence in this proceeding that either of these companies has made any unauthorized increase in fares or otherwise operated unlawfully or improperly. Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, operates a coach service between the San Francisco and Los Angeles areas. The record shows that his fare for this service was maintained at $9.95 until March 28, 1951, on which date he increased it to $11.70, under authorization from this Commission.[2] The evidence is clear that Friedkin properly continued to assess and collect the lower fare until his tariff was lawfully amended. As to these three carriers the investigation may be discontinued upon cancellation of the inoperative tariffs.

The remaining respondents are California Central Airlines, United Air Lines, Inc. and Western Air Lines, Inc. As to these three carriers the essential facts are similar and undisputed. Each of them operates coach flights between the San Francisco and Los Angeles areas. For some time prior to March 1, 1951, California Central Airlines maintained for this service a one-way fare of $9.99 and the other two companies maintained a fare of $9.95. Effective with that date each of the companies started to collect and thereafter continued to collect a fare of $11.70. Each of the companies had filed with the Commission, prior to March 1, an application seeking authority to make the fare increase. None of the applications had been granted prior to March 1, nor have they yet been granted.[3]

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[2]Authority No. 20-12-121 of March 20, 1951.

[3]It was these circumstances which impelled the institution of this proceeding.

At the conclusion of the taking of evidence the Commission's staff moved that the Commission promptly issue a preliminary order requiring the three respondents (1) to cease and desist charging passenger fares for air line coach travel in excess of the authorized fares set forth in their tariffs on file with the Commission, (2) to prepare and maintain a record of the names and addresses of all persons from whom more than the authorized fares have been or may be collected subsequent to February 28, 1951, and (3) to make reparation of the excess of the unauthorized fares over the authorized fares to all passengers whose names and addresses are reasonably ascertainable. Replies to the motion were, by agreement, incorporated in the briefs filed by the three respondents.

At the hearing and in their briefs the three carriers urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the companies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion.

The jurisdictional question may be considered first. The respondents argue on various grounds that the provisions of Article XII of the California Constitution are not applicable to air carriers, that the constitutional sections are not self-executing, and that the California legis-

lature has not made a specific grant of power to the Commission to regulate air carriers. United Air Lines, Inc., and Western Air Lines, Inc., assert further that the regulation of air commerce is a field which has been completely occupied by the Federal government under the Civil Aeronautics Act of 1938. United Air Lines, Inc., advance the additional argument that its operations in question are interstate in nature.

Article XII of the California Constitution contains many provisions which are pertinent to the jurisdictional question. Section 17 of said Article provides that, "All railroad, canal, and other transportation companies are declared to be common carriers, . . ." Section 23 of said Article, in part, states "every common carrier, is hereby declared to be a public utility . . ."

The staff on cross-examination of witnesses for the airlines developed the fact and we now find that the three air carriers, California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., which have increased their coach fares without Commission authorization offer their services to the public in general. Counsel for United Air Lines, Inc., in their brief admit that United is a common carrier.

In the recent case of *State ex rel. State Railway Commission v. Ramsey* (1949), 151 Nebr. 333, 27 N. W. (2d) 502, the Supreme Court of Nebraska in considering whether air carriers are common carriers as that term is used in the Nebraska Constitution laid down the following principles:

> ". . . A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community.

> The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply to all things to which they are in their nature applicable . . . These principles have been held to be applicable to transportation by air. . . . Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier." (p. 338 Nebr. Reports)

The California Supreme Court had under consideration in *Western Association of Short Line Railroads v. Railroad Commission* (1916), 173 Cal. 802, 162 Pac. 391, the question whether companies engaged in the then new businesses of transporting freight in motor trucks and passengers in automobile stages were "other transportation companies" referred to in Article XII of the California Constitution. The Court unequivocally held that they were public transportation companies, common carriers, and public utilities.

In light of the foregoing cited constitutional provisions and judicial decisions, we find and hold that the herein air carriers operating under coach fares between the Los Angeles area and the San Francisco Bay area are transportation companies, common carriers and public utilities.

We now turn to the question whether the Public Utilities Commission has jurisdiction over the air carriers with respect to increases in fares charged for transportation between points within the State of California.

Section 20 of Article XII of the California Constitution, in part, provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission provided for in this Constitution, that such increase is justified. . . ."

Section 22 of Article XII of the California Constitution, in part, provides:

> "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission than the rates, fares and charges which are specified in such tariff. . . ."

In the *Short Line Railroads* case, *supra*, the Supreme Court ordered that a peremptory writ of mandate issue requiring the Commission to assume the jurisdiction conferred by the above-quoted portion of Section 22. With reference to the absence of enabling legislation, the Court stated at page 804:

> "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or

by direct enactment, to modify, curtail, or abridge this constitutional grant."

That decision is a clear statement that the provisions of said Section 22 of the constitution are self-executing, and that the Commission must exercise the authority therein conferred regardless of any absence of legislative enactments. While the Court did not refer to Section 20, there is no reason why the same construction would not be given that section.

Various of the respondents have referred to *In re Martinez* (1943), 22 Cal. (2d) 259, 138 P. (2d) 10, as being contrary to the principles above set forth. It is true that the *Martinez* case contains dictum to the effect that the Commission may exercise jurisdiction only where such jurisdiction is given by the legislature. However, in the *Martinez* case the Court had under consideration Section 23 of Article XII which reads, in part, as follows:

". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The grant of jurisdiction to the Commission over intrastate rates of air carriers is found in Sections 20 and 22 of Article XII of the constitution. The provision quoted from Section 23 of said Article can claim no priority over

Sections 20 and 22 of said Article unless the former provision is more specific than the latter. As a matter of fact the latter are more specific than the former with respect to the regulation of rates of "other transportation companies." Should there be any possible ground for doubt on this point the provisions of Section 23 are conclusive against the contentions of respondents. Said Section 23 further provides, in part, as follows:

> ". . . Nothing in this section (Section 23 of Article XII) shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

In the face of these plain and unambiguous provisions of the constitution and in view of the holding in the *Short Line Railroads* case, *supra*, the dictum in the *Martinez* case cannot be considered as establishing a rule of law contrary thereto.

The Civil Aeronautics Act does not purport to extend economic regulation to intrastate transportation of persons or property other than mail. The states are therefore free to regulate intrastate rates and fares of air carriers to the same extent as they regulate intrastate rates and fares of railroads, trucking and bus companies, and telephone and telegraph utilities. (*Cooley v. Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. Ed. 996; *Minnesota Rates Cases* (1913), 230 U. S. 352, 57 L. Ed. 1511; *Eicholz v. Public Service Commission* (1939), 306 U. S. 268, 83 L. Ed. 641; *Smith v. Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. Ed. 255; *Lindheimer v. Illinois Bell Telephone Co.* (1934), 292 U. S. 150, 78 L. Ed. 1182.)

Based upon the law and the facts we hold that the jurisdiction of the Commission in the premises is clear and that such jurisdiction should be exercised. The contention of respondents to the contrary we hold to be without merit.

A number of exhibits were submitted in justification of the reasonableness of the $11.70 fare. Among these was a 17-page inter-departmental memorandum of the Civil Aeronautics Board consisting essentially of estimates of revenues generated and expenses incurred by United Air Lines, Inc., and Western Air Lines, Inc., for air coach operations on the Pacific Coast. According to this memorandum, United incurred a loss of $73,461 in the San Francisco-Los Angeles operations for the period May through August, 1950, and Western similarly incurred a loss of $27,478 for the period June through August, 1950.[4] It was pointed out that the fare of $11.70 represents an increase of approximately one-half cent per passenger mile over the $9.95 fare, and that it results in a per-mile fare of about 3½ cents. According to the Civil Aeronautics Board, this contrasts with recently increased fares of 4½ cents per passenger mile now generally prevailing throughout the rest of the country for air coach services. The record in this proceeding is clear that the $11.70 fare was developed, recommended, and in fact urged upon the carriers, by that Board.

United Air Lines, Inc., through its traffic manager, introduced additional evidence concerning the operation of its coach flights between the San Francisco and Los Angeles areas. For its revenue and expense allocations, however, this company offered only the aforesaid analysis

[4]The estimated losses are on the basis of fully allocated costs.

made by the staff of the Civil Aeronautics Board. United did not submit comparable estimated results for the future. The following table shows actual operating experience at the $9.95 fare as developed by the Board's staff and submitted by the company. A second column shows, for comparative purposes, the results which would have obtained for the same period if the higher fare had applied and all other conditions were unchanged.

UNITED AIR LINES, INC.

(Four Months Ending with August, 1950)

	Actual Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare
Revenues	$549,629	$549,629
Additional Revenue from Increased Fare	—	96,735[1]
Total Operating Revenues	$549,629	$646,364
Operating Expenses:		
Flying Operations	$121,884	
Direct Maintenance Flight Eqpt.	36,549	
Depreciation—Flight Eqpt.	63,378	
Ground & Direct Maintenance	38,160	
Ground Operations	90,083	
Stewardesses' Salaries & Expense	8,054	
Passenger Insurance & Supplies	9,847	
Traffic and Sales	90,529	
Advertising and Publicity	11,703	
General and Administrative	47,881	
Depreciation—Ground Eqpt.	16,925	
General Headquarters Expense	88,097	
Total Operating Expense	$623,090	$623,090[2]
Net Operating Profit[3]	$(73,461)	23,274
Operating Ratio[3]	113.4%	96.4%

(_____) Denotes Loss

[1]Revenue resulting from a 17.6 per cent increase in fares.

[2]Carrier did not submit 1951 estimated expenses.

[3]Before federal income taxes.

The director of budgetary controls of Western Air Lines, Inc., introduced and explained an exhibit showing month-by-month results of coach operations between the San Francisco and Los Angeles areas for the nine months from June, 1950, through February, 1951. The increase in passenger revenues, assuming a fare of $11.70 instead of $9.95, was included, but this company, like United, did not submit estimated revenues or expenses for the future. The actual and adjusted figures for Western Air Lines, Inc., are shown in the table which follows:

WESTERN AIR LINES, INC.

(Nine Months Ending With February, 1951)

	Actual[1] Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare
Revenues	$1,063,527	$1,063,527
Additional revenue from increased fare		184,793[2]
Total Operating Revenue	$1,063,527	$1,248,320
Operating Expenses:		
Flight Operations	$ 263,881	
Direct Maintenance	94,114	
Depreciation of Flight Eqpt.	126,000	
Indirect & Ground Expense	683,770	
Total Operating Expenses	$1,167,765	$1,167,765[3]
Net Operating Profit[4]	(104,238)	$ 80,555
Operating Ratio[4]	109.8%	93.6%

( ) Denotes Loss

[1]February costs based on January experience prorated for 28 days.

[2]Additional revenue resulting from the increased fare as estimated by the witness.

[3]Carrier did not submit 1951 estimated expenses.

[4]Before federal income tax.

California Central Airlines, which operates wholly within the State of California, derives approximately 90

per cent of its revenue from coach flights between the San Francisco and Los Angeles areas. The operations of this company were not included in the staff report of the Civil Aeronautics Board. Exhibits submitted by the company show revenues, expenses, and estimated costs, as well as various plane-mile and passenger-mile data. According to the evidence, the company earned in the year 1950 a net profit of $1,512; and, if the higher fare and certain increased expenses had been in effect during the year, would have received an estimated net profit of $20,104. The operating ratios would be 99.8 per cent and 98.0 per cent, respectively. The figures as submitted by this company are summarized in the following table:

CALIFORNIA CENTRAL AIRLINES

(Twelve-Month Period)

	Year 1950 Actual Experience at $9.99 Fare	Year 1951 Estimated Experience at $11.70 Fare
Operating Revenues	$855,145	$981,371[1]
Operating Expenses:		
Flying Operations	$605,290	
Ground Operations	31,508	
Ground & Indirect Maintenance	8,995	
Passenger Service	15,600	
Traffic and Sales	114,806	
Advertising & Publicity	31,537	
General & Administrative	44,564	
Depreciation—Ground Property	1,333	
Total Operating Expenses	$853,633	$961,267[2]
Net Operating Revenues[3]	$ 1,512	$ 20,104
Operating Ratio[3]	99.8%	98.0%

[1]Revenue resulting from the 17.1 per cent increase in fares and an estimated diminution of five per cent in the number of passengers carried.

[2]The estimated expenses for 1951 were not segregated by accounts.

[3]Before federal income tax.

None of the companies supplied all of the supporting or underlying data which would be desirable. Nevertheless, considering all of the circumstances of record, the evidence is convincing, and we find as a fact, that the higher fare is justified. Publication, filing and maintenance of the fare will be authorized.

It is entirely clear, however, and indeed it is not disputed, that California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., increased their fares without first receiving authorization from this Commission. Timely requests for authority to make the increase were filed, but the showings required by the state constitution were made belatedly, and were incomplete at the time the instant investigatory proceeding was instituted and notice thereof served upon the respondents. The order which follows will authorize publication and maintenance of the $11.70 fare for the future. These companies are hereby placed on notice that they are and will hereafter be deemed to be "transportation companies" within the meaning of the Constitution of the State of California, and that they are subject to the prohibitions and requirements of said constitution. We also call the attention of these companies to Section 76(a) of the Public Utilities Act, which provides:

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty

of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

In view of the fact that these air carriers since March 1, 1951, have been charging fares in excess of the fares reflected by their tariffs on file with this Commission as applied to coach operations between the San Francisco Bay area airports and the Los Angeles area airports, we are of the opinion that amounts collected in excess of such tariff fares should be refunded, wherever possible, to passengers who have paid the same and such direction will be incorporated in the order following this opinion. Sections 20, 21 and 22 of Article XII of the State Constitution require that such reparation be made.

There is some evidence, not hereinbefore discussed, relative to possible failure of some of the respondents to comply strictly with their filed tariff rules governing refunds or exchanges of unused tickets. This subject was subordinate to the basic issues in this proceeding, and the evidence thereon was in any event inconclusive. On this subject we make no finding of fact.

Order

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

It Is Hereby Ordered:

1. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby authorized to publish, file and maintain a one-way adult coach fare of $11.70 for transportation of passengers be-

tween San Francisco Bay area airports on the one hand and Los Angeles area airports on the other hand.

2. That California Central Air Lines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby ordered to make reparation, wherever possible, to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand the the Los Angeles area airports on the other hand, in excess of the fares as reflected by the tariffs of these air carriers on file with this Commission.

3. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., and all other of the respondents operating as common carriers, be and they are hereby adjured and admonished that they may not, for the transportation of passengers and property in intrastate commerce between points within the State of California, raise any rate of charge under any circumstances whatsoever except upon a showing before the Commission that such increase is justified, make unreasonable charges, discriminate in charges or facilities, nor in any other manner violate any of the provisions of Article XII of the Constitution of the State of California applicable to transportation companies.

4. That tariffs heretofore filed with this Commission by Arrow Airways, Inc., and Robin Airways, Inc., naming fares, rules and regulations governing transportation of passengers between points in this state, be and they are hereby canceled.

5. That the several pending motions for dismissal of the proceeding as to particular respondents, and the pending motion for issuance of a "preliminary order," be and they are hereby denied.

6. That, upon the effective date of this order, this investigation be and it is hereby discontinued.

The Secretary is hereby directed to cause a certified copy of this decision forthwith to be served personally on Arrow Airways, Inc., California Central Airlines, Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, Robin Airways, Inc., Southwest Airways Company, Transworld Airlines, United Air Lines, Inc., and Western Air Lines, Inc.

The effective date of this decision shall be fifteen (15) days after the date hereof.

Dated at San Francisco, California, this 24th day of April, 1951.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
HAROLD P. HULS,
KENNETH POTTER,
PETER E. MITCHELL,
Commissioners.

DEC 5 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 464

UNITED AIR LINES, INC,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EVERETT C. MCKEAGE,
Chief Counsel,
WILSON E. CLINE,
Associate Counsel,
Counsel for Public Utilities Commission of the State of California.

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SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED AIR LINES, INC,

Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent-Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of United Air Lines, Inc., petitioner and appellant (hereinafter referred to as United), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

United is regularly engaged as a common carrier in the business of carrying passengers by air. Among others its operations include both standard and coach-class flights between the Los Angeles area airports and the San Francisco Bay area airports and vice versa. On its coach-class flights between these airports United carries passengers whose journeys are wholly within the State of California and pas-

sengers whose flights are only segments of interstate journeys. On these air coach flights United carries U. S. mail.

United has had tariffs covering its intrastate operations continuously on file with the Commission since November 28, 1931. The fares under consideration in this appeal are the one-way adult fares for coach-class passenger air service between Los Angeles area airports and the San Francisco Bay area airports.

These same fares were the subject of investigatory proceedings instituted on the Commission's own motion against various air carriers in 1949. In Decision No. 43932 (March 14, 1950), 49 Cal. P.U.C. 494, issuing out of this proceeding, the Commission found that it had authority to institute such proceedings under Article XII of the California Constitution and pursuant to such authority the Commission found that the one-way fares of $9.95 and $9.99 then being charged had been shown to be reasonable. As United at that time was not engaged in air coach operations between the Los Angeles area airports and the San Francisco Bay area airports it was not made a party to this proceeding.

United later became engaged in air coach operations between these airports and filed an intrastate adult one-way tariff of $9.95 with the Commission. Subsequently United made application to the Commission, by letter dated February 9, 1951, to increase its intrastate one-way adult coach fares between Los Angeles and Oakland/San Francisco from $9.95 to $11.70 to be effective March 1, 1951.

Previously, on February 7, 1951, Western Air Lines, Inc., (hereinafter referred to as Western), had made a similar application with the Commission, and shortly thereafter but before March 1, 1951, Pacific Southwest Airlines and California Central Airlines, the only other air carriers operating under coach-class fares between the Los Angeles area and the San Francisco Bay area, mailed applications

to the Commission requesting authority to increase their intrastate one-way adult coach-class fares to $11.70 on March 1, 1951.

The evidence subsequently introduced at the Commission hearings showed that all these applications for fare increases had been filed pursuant to request by the Civil Aeronautics Board that these air carriers increase their coach-class fares between the Los Angeles area and the San Francisco Bay area to $11.70 effective March 1, 1951. That the Civil Aeronautics Board intended these requests to apply to intrastate fares is made clear by the fact that they were directed to Pacific Southwest Airlines and California Central Airlines, both of which are non-certificated air carriers engaged solely in intrastate operations wholly within the State of California, as well as to Western and United.

As the information submitted in support of the various applications filed with the Commission was not sufficient to warrant the ex parte authorization of the requested increases, the tendered tariff pages were rejected. Nevertheless, on March 1, 1951, California Central Airlines, Western and United proceeded to increase their fares to $11.70 without Commission authorization. As a result on March 6, 1951, the Commission issued its order of investigation.

Hearings were held in Los Angeles on March 10 and March 27, 1951. At the outset and throughout the course of the hearings, California Central Airlines, Western and United made clear their contention that the Commission had no jurisdiction over their fares, Western and United both claiming lack of jurisdiction by reason of the Federal Constitution as well as the California Constitution. However, at the March 27, 1951 hearing all three did submit evidence in justification of the intrastate coach-class fare increases and sought Commission approval of the applications which previously had been filed.

On March 19, 1951, Pacific Southwest Airlines refiled its application, this time with sufficient supporting data to enable the Commission to act favorably thereon. On March 20, 1951, the Commission *ex parte* authorized Pacific Southwest Airlines to increase its coach fares, and pursuant to such authorization its coach-class fares for the first time were increased to $11.70 effective March 28, 1951.

The Commission issued its Decision No. 45624, 50 Cal. P.U.C. 563, April 24, 1951, a copy of which decision appears as Appendix B attached to United's Jurisdictional Statement. The order therein authorized California Central Airlines, Western and United to increase their intrastate one-way adult coach-class fares for transportation of passengers between the San Francisco Bay area airports and the Los Angeles area airports to $11.70 and directed these three carriers to make reparation, wherever possible, to passengers paying coach fares between said airports in excess of the authorized fares. The effective date of the order was May 9, 1951. Central California Airlines, Western and United filed timely petitions for rehearing with the Commission, all of which petitions were denied by the Commission by decisions dated May 15, 1951.

In the meantime, on May 4, 1951, United, pursuant to Commission Decision No. 45624, *supra*, filed its revised tariff covering intrastate air coach-class fares between the Los Angeles area airports and the San Francisco Bay area airports, effective May 10, 1951. Likewise Western and California Central Airlines filed revised tariffs covering such fares.

California Central Airlines upon denial of its petition for rehearing acquiesced in the order of the Commission and indicated it would proceed with reparation wherever possible.

June 14, 1951, Western and United filed petitions for writs of review of the Commission Decision No. 45624,

supra, with the California Supreme Court, S.F. No. 18427 and S.F. No. 18426, respectively. Both petitions were denied by the California Supreme Court by orders issued without opinion, filed August 2, 1951. On August 16, 1951, Western filed with the California Supreme Court a petition for rehearing of the order denying the writ of review, and on August 30, 1951, the California Supreme Court denied this petition for rehearing by order again without opinion.

United has stated on page 6 of its Jurisdictional Statement that it filed no petition for rehearing because no procedure is provided under the laws of the State of California for filing a petition for rehearing of an order of the California Supreme Court denying a petition for writ to review a Commission order. However, Rules 27 and 53 of Rules on Appeal for the Supreme Court (California), adopted by the Judicial Council, as amended to January 1, 1951, 36 Cal. (2d) 1, do provide for the filing of a petition for rehearing of such a California Supreme Court decision.

On October 26, 1951, both Western and United filed appeals from the orders of the California Supreme Court with the United States Supreme Court. If hearings be granted on these appeals this Commission will in due time move that the United States Supreme Court consolidate these appeals for hearing.

II. Statement of the Issues on Appeal

The basic issues raised by United on its appeal to the United States Supreme Court appear in italics on pages 17 and 18 of its Jurisdictional Statement as follows:

(1) "The United States Has Assumed Exclusive Control of the Rates of Air Carriers."

(2) "Respondent's Order Unlawfully Interferes With Interstate Commerce."

(3) "Respondent Seeks to Deprive Petitioner of Property Without Due Process."

Issue (1) above is too broad in its scope. In considering the issue as stated by United, the Court would have to determine whether the Civil Aeronautics Act precludes the Commission from regulating the intrastate fares charged intrastate passengers by a non-certificated carrier engaged in commercial air transportation wholly within the State of California and carrying only intrastate passengers. Admittedly, United is not such an air carrier, and, as previously stated, California Central Airlines, the only such air carrier whose fares are regulated by the Commission order here under consideration, has acquiesced in its validity.

The Commission wishes the Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The specific fare under consideration is an intrastate fare inasmuch as the $11.70 is for travel between airports within the State of California. However, this intrastate fare may be charged an interstate passenger (*i.e.*, one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey), as an integral part of an interstate fare, or it may be charged an intrastate passenger (*i.e.*, one whose entire journey is within the State of California). The Commission takes the position that its order, as set forth in Decision No. 45624, *supra*, pertains only and could pertain only to fares which are being charged to those passengers whose journeys between the Los Angeles area airports and the San Francisco Bay area airports are intrastate journeys and not integral parts of interstate journeys. Such fares are hereinafter referred to as intrastate fares.

We believe the following questions to be more definitive of the issues before the Court in this appeal:

(1) Has the Congress, through the Civil Aeronautics Act of 1938, as amended (52 Stats. 977, 49 U.S. Code 401, *et*

seq.), pre-empted the field of economic regulation of air carriers engaged in interstate commerce, or in the transportation of U.S. mail, or both, so as to preclude the Commission from regulating the intrastate fares charged intrastate passengers by such carriers for transportation between points in California?

(2) Does the order of the Commission regulating the intrastate fares charged intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).

(3) Does the Commission's order requiring air carriers engaged both in intrastate and interstate commerce to make reparation to passengers paying intrastate fares for transportation between points in California in excess of the intrastate fares included in their authorized tariffs on file with the Commission deprive such carriers of property without due process of law?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Although the United States Supreme Court has not issued a decision specifically answering the above stated questions with respect to air carriers, this Court has considered substantially the same questions in cases involving other types of carriers and utilities and has clearly determined such issues in favor of the validity of the Commission's order. We propose to demonstrate that United has raised no substantial Federal question by its attempted appeal.

A. *Preliminary Statement*

With respect to the general question of Commission jurisdiction over rates of air carriers, it is interesting to

note that United has, since November 28, 1931, submitted to this jurisdiction by having on file with the Commission, either in its own name or that of a subsidiary or affiliate, tariffs of its intrastate fares. Western has had tariffs of its intrastate fares on file with the Commission since June 21, 1945. Both Western and its subsidiary, Western Air Lines of California, Inc., acquiesced in Commission Decision No. 43932, 49 Cal. P.U.C. 494, which found that the Commission had authority under Article XII of the California Constitution to institute proceedings to determine the reasonableness of intrastate fares of air carriers and, pursuant to such authority, found that the one-way fares of $9.95 and $9.99 being assessed for airline coach-class service between Los Angeles and San Francisco had been shown to be reasonable.

The inconsistent positions taken by the petitioners are further clearly demonstrated by the fact that both Western and United filed applications with the Commission seeking approval of the $11.70 fare as an intrastate fare, and both petitioners, pursuant to Commission Decision No. 45624, which is here under attack, have filed tariffs with the Commission setting forth the $11.70 one-way adult fare for air-coach service between the Los Angeles area airports and the San Francisco Bay area airports.

Western and United are willing to take the benefit of Commission authorization of the increased fares but deny that the Commission has jurisdiction to exercise such authority. It is a rule of law that one may not approbate and reprobate at the same time, particularly where he accepts the benefit of the approbation. The actions of United and Western prove a clear recognition on their part (although they seek to deny it) of the lawful authority of the Commission to regulate their intrastate fares.

The Interstate Commerce Clause of the Constitution of the United States became effective in 1789, the Civil Aero-

nautics Act in 1938. For logical as well as historical reasons we prefer to discuss the issues outlined above in different order.

B. *The Order of the Commission Regulating the Intrastate Fares Charged Intrastate Passengers by Air Carriers Engaged Both in Intrastate and Interstate Commerce for Transportation Between Points in California Does Not Place Such a Burden on Interstate Commerce as to Constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).*

The fact that United is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the order of the Commission is concerned. The regulation of fares charged by air carriers requires no more uniformity than does the regulation of fares and rates of railroads, bus lines, truck lines, and telephone and telegraph utilities.

The speed of an airplane loses its significance when compared to the speed of transmittal of a telephone or telegraph message. It is a matter of common knowledge that the separation of interstate and intrastate operations of telephone and telegraph utilities is much more difficult than the separation of the interstate and intrastate operations of passenger and freight carriers, including air carriers. However, such facts have not resulted in exclusion of state regulation of charges for intrastate telephone and telegraph messages.

It has long been held by the United States Supreme Court that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation in so far as intrastate operations are concerned, even though

their interstate operations are regulated by Federal authority.

Cooley v. *Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996.

Minnesota Rate Cases (1913), 230 U. S. 352, 57 L. ed. 1511.

Eicholz v. *Public Service Commission* (1939), 306 U. S. 268, 83 L. ed. 641.

Smith v. *Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. ed. 255.

Lindheimer v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 78 L. ed. 1182.

In the recent case of *Alabama Public Service Commission* v. *Southern Railway Company* (1951), 341 U. S. (Preliminary Print) 341, 345, 95 L. ed. Adv. Ops. 708, 711, the United States Supreme Court, speaking through Mr. Chief Justice Vinson, made the following statement regarding state regulation of intrastate transportation:

> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U. S. C. §§ 1, et seq. But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. • • • And Congress has since provided:
>
> " 'That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 U. S. C. § 1 (17(a)).

> "This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 L. ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The United States Supreme Court has held that the states may even regulate *interstate* commerce of a local nature until such time as the Congress has pre-empted the entire field of interstate commerce.

Kelly v. *Washington* (1937), 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission* (1951), 341 U. S. (Preliminary Print) 329, 333, 95 L. ed. Adv. Ops. 673, 676.

The United States Supreme Court, in upholding state regulation of direct sales of gas for consumptive use by a natural gas company which was engaged in interstate commerce, through the majority opinion delivered by Mr. Justice Minton, in the case of *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission* (1951), 341 U. S. (Preliminary Print), 329, 333, 95 L. ed. Adv. Ops. 673, 676, went even further to state:

> " * * * In the absence of federal regulation, state regulation is required in the public interest. * * *"

C. The Congress Through the Civil Aeronautics Act, as Amended (52 Stats. 977, 49 U. S. Code 401 et seq.) Has Not Pre-empted the Field of Economic Regulation of Air Carriers Engaged in Interstate Commerce, or in the Transportation of U. S. Mail, or Both, so as to Preclude the Commission from Regulating the Intrastate Fares Charged Intrastate Passengers by Such Carriers for Transportation Between Points in California.

Section 1(2) of the Civil Aeronautics Act (49 U. S. Code 401(2)) defines "air carrier" as one engaged in "air transportation," and "air transportation" is defined in Section 1(10) (49 U. S. Code 401(10)) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

Air carrier economic regulation under Sections 401, 403, and 404 of the Civil Aeronautics Act (49 U. S. Code 481, 483, and 484) is limited to the regulation of "air transportation." The rates, fares, and charges regulated by the Civil Aeronautics Board under these sections are "rates, fares, and charges for air transportation."

There is nothing in the Civil Aeronautics Act which gives the Civil Aeronautics Board jurisdiction over intrastate fares charged intrastate passengers by "air carriers", nor is there anything in the Act which prevents the states from exercising jurisdiction over such fares.

Even though the provisions of the Civil Aeronautics Act were not clear in this regard, the United States Supreme Court has held that any doubt should be resolved in favor of state power. We quote from the majority opinion of Mr. Justice Brandeis in *Arkansas Railroad Commission* v. *Chicago, R. I. & P. Co.* (1927), 274 U. S. 597, 603, 71 L. Ed. 1224, 1228:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed.

> Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"

Although Section 406(b) of the Civil Aeronautics Act (49 U. S. Code 486) permits the Civil Aeronautics Board in fixing reasonable rates for the transportation of mail by air to consider the need of the air carrier and its revenue from other sources, such section does not preclude state regulation of intrastate passenger fares. The California Public Utilities Commission is as duty bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty bound to fix just and reasonable interstate fares. There are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

Rosenhan v. *United States* (1942), 131 F. (2d) 932, cert. den. 318 U. S. 790, 87 L. Ed. 1156, is sometimes cited as case authority to show that the Federal government has pre-empted the entire field of air carrier regulation. The case relates only to the safety regulatory provisions of the Civil Aeronautics Act, however.

Federal regulation of the safety phase of the operations of air carriers is pursuant to Section 601 of the Civil Aeronautics Act (49 U. S. Code 551) which grants the Civil Aeronautics Board authority over "air commerce." Section 1(3) of the Act (49 U. S. Code 401(3)) defines "commerce" to mean "interstate, overseas, or foreign air commerce or transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign commerce."

A review of the definition of "air commerce" and the safety provisions of the Civil Aeronautics Act clearly

demonstrates that the Congress knows how to use language to extend Federal regulation to intrastate activities when it desires to do so.

The Congress has consistently refused to occupy the entire field of regulation of air carriers, although the Civil Aeronautics Board and the interstate air carriers on numerous occasions have strenuously attempted to destroy state regulation of air carriers by prevailing upon the Congress to supersede state authority.

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress: Lea-Bailey Aviation Bill introduced as H. R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill S. 541; Lea Bill, H. R. 3383.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944	N. A. R. U. C.	Proceedings	221
1945	"	"	299
1946	"	"	210
1947	"	"	128
1948	"	"	69
1949	"	"	166
1950	"	"	106

For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer United to the paragraphs appearing under the heading "Federal Jurisdiction" commencing on page 8 of H. R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H. R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads in part as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill."

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H. R. 3420, as reported by the committee, because (1) it destroys States' rights, • • •
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* [emphasis added] all rights of the States:
>
> "(1) *To regulate intrastate commerce by air*, including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not take away the rights of the States. H. R. 3420 was never enacted into law.

"Appropriate Areas of State Economic Regulation" by Frederick G. Hamley (1946), 11 Law and Contemporary Problems 488, is an excellent article setting forth views in support of the continuance of state regulation of air carriers.

By seeking to have the United States Supreme Court, by judicial decision, preclude the states from regulating

the intrastate fares of air carriers United presents a bold attack upon our Federal form of government. This Court, however, has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for the Supreme Court of the United States, clearly reiterated these principles in the case of *Davies Warehouse Co.* v. *Bowles* (1944), 321 U. S. 144, 153-155, 88 L. Ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> • • • • • • •
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. * * *
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

D. *United Can Comply With the Reparation Order of the Commission Without Violating the Provisions of Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)).*

Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)) in part provides:

> "(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; * * *."

This Court will note that the terms used therein are "air carrier" and "air transportation" as defined in the Act and not "air commerce." Hence the section applies to interstate and not to intrastate fares. Concededly the order of the Commission applies only to intrastate fares.

Even though United does find itself in a dilemma, it has no right to complain, as its own voluntary actions have created the situation. Air carriers, like other common carriers, advisedly should obtain all the necessary authorizations from the proper regulatory bodies, both State and Federal, before placing into effect an increase in fares.

E. *The Commission's Order Requiring Air Carriers Engaged Both in Intrastate and Interstate Commerce to Make Reparation to Passengers Paying Intrastate Fares for Transportation Between Points in California in Excess of the Intrastate Fares Included in Their Authorized Tariffs on File with the Commission Does Not Deprive Such Carrier of Property Without Due Process of Law.*

As the preceding sections of this Statement in Opposition to Appellant's Statement of Jurisdiction clearly demon-

strate that the Commission does have jurisdiction over the intrastate fares charged by air carriers for transportation between points in California, the Commission's order herein under attack, requiring United to make reparation, does not unconstitutionally deprive United of its property without due process of law, in violation of the 14th Amendment, Section 1, of the Constitution of the United States of America.

IV. Conclusion and Motion to Dismiss or Affirm

We respectfully submit that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling United to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California, November 9, 1951.

Respectfully submitted,

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FILED
DEC 7 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 464

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Pursuant to Supreme Court Rule 7, Paragraph 3, United Air Lines, Inc., Appellant (hereinafter referred to as "United") files this its brief opposing the Motion to Dismiss or Affirm of the Public Utilities Commission of the State of California, heretofore filed herein and served on United on November 14, 1951, and states as follows:

I.

THIS APPEAL PRESENTS SEVERAL SUBSTANTIAL FEDERAL QUESTIONS.

A. The Order of the Commission, Which Regulates Fares Charged Both Interstate and Intrastate Passengers by United, Is Beyond the Commission's Jurisdiction and Is in Direct Conflict With Federal Legislation.

The Motion of the Public Utilities Commission of the State of California (herein referred to as the "Commission") contains a significant admission which demonstrates not only that the federal questions involved in this appeal are substantial but that the Commission's reparation order of April 24, 1951, as applied to United, is beyond the Commission's jurisdiction. The record shows, and the Commission concedes (Motion, pp. 1-2), that a substantial number of persons carried by United on its air coach flights between the Los Angeles and San Francisco Bay areas are passengers whose flight between those areas is only one segment of an interstate journey. Some of those passengers travel on through coach tickets between the Los Angeles area and Portland, Oregon, and Seattle, Washington. Others travel on a local air coach ticket between the Los Angeles and San Francisco Bay areas but either originate or terminate their journeys outside the State of California. The Commission's order clearly covers all persons in this latter group, as well as all other passengers, who traveled *via* United on local air coach tickets between the Los Angeles and San Francisco Bay areas during the period from March 1 to May 9, 1951.

Paragraph 2 of the Commission's order directs United, among others, to make reparation, wherever possible, "to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand and

the Los Angeles area airports on the other hand." The order is not limited to intrastate passengers (defined by the Commission as those persons whose entire journeys are within the State of California). It is evident from the broad scope of the Commission's investigation and from the position taken by its counsel at the hearing that the Commission did and always intended to assert jurisdiction over *all* passenger traffic, both interstate and intrastate, which was carried by United on local air coach tickets between the Los Angeles and San Francisco Bay areas. At the conclusion of the hearing on March 27, 1951, the Commission's staff moved that the Commission promptly issue a preliminary order, requiring United, among others, to cease and desist charging passenger fares "for airline coach travel between the said Los Angeles area and the said San Francisco area in excess of the authorized fares set forth in their tariffs on file with the Commission until such time as the Commission orders otherwise."

It is therefore clear that the Commission, by its order, sought to exercise jurisdiction over all of United's interstate passengers traveling on a local air coach ticket between the Los Angeles and San Francisco Bay areas. The Commission in its Motion now concedes that it lacks such jurisdiction, but "takes the position" that it's order does not pertain to such passengers. The breadth of the Commission's order, however, cannot be narrowed by a position taken on brief. The broad and definitive order itself, issued pursuant to the alleged authority of Article XII, sections 20 and 22, of the California Constitution, remains inclusive and unamended. Whether those sections, as thus interpreted, are repugnant to the Constitution of the United States, Article I, Section 8, and the 14th amendment thereof, Section 1, and are further in conflict with and repugnant to the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401, *et seq.*), are substan-

tial federal questions. Whether or not an interstate air carrier such as United, holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board of the United States, pursuant to the Civil Aeronautics Act of 1938, as amended, is subject to the regulatory control, with reference to its rates, fares, and charges, of a state in which a portion of its operations are conducted, and if so, whether such control extends to interstate traffic carried by such a carrier, are important questions of federal law which have not been but which should be settled by this Court to promote orderly regulation, development and expansion of air commerce in the United States.

It is no answer to say, as the Commission has said in its Motion (pp. 9-11), that while denying the Commission's jurisdiction over its rates United is willing to take the benefit of Commission authorization of the increased fare between the Los Angeles and San Francisco Bay areas, and that United's action in filing tariffs with the Commission "prove a clear recognition" of the Commission's lawful authority to regulate its intrastate fares. United has never considered that the Commission's rate regulating activities were being performed for its benefit. It has complied with previous Commission demands in the now exploded hope that by such compliance it could avoid litigation. If such compliance ever constituted consent to the Commission's jurisdiction, which United denies, the law is clear that the consent of parties cannot give jurisdiction to a public administrative body where the law itself does not confer it.

> *East Ohio Gas Co.* v. *Federal Power Commission*, 173 F. 2d 429, 434-435 (C. A. D. C. 1948), reversed on other grounds 338 U. S. 464 (1950); 73 C. J. S., Public Administrative Bodies and Procedure, § 116.

That the Commission's jurisdiction does not extend to

the regulation of fares charged interstate passengers by United is plain.

> *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S. 557, 577 (1886).

In the *Minnesota Rate Cases,* 230 U. S. 352 (1913), this Court said (399, 401):

> "There is no room in our scheme of Government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. * * * They [the States] have no power * * * to prescribe the rates to be charged for transportation from one State to another. * * *"

With respect to air transportation, the power of fare regulation has been fully exercised by Congress and granted comprehensively to the Civil Aeronautics Board. Pursuant to sections 1(10) and 1(21) of the Civil Aeronautics Act of 1938, *supra,* "air transportation" includes interstate air transportation, and "interstate air transportation" includes

> "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—(a) a place in any State of the United States or the District of Columbia, and a place in any other State of the United States, or the District of Columbia * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Section 403 of that Act (52 Stat. 992, 49 U. S. C. 483) requires that every air carrier (which term is defined in section 1(2) to mean any United States citizen who under-

takes to engage in air transportation) shall file with the Civil Aeronautics Board "tariffs showing *all* rates, fares, and charges for air transportation *between points served by it*," and provides that no air carrier shall charge a greater or less or different compensation for air transportation than the fares specified in its currently effective tariffs. [Emphasis added.]

It is also clear, as the Commission has conceded, that passengers traveling between the Los Angeles and San Francisco Bay areas on one leg of an interstate journey are interstate passengers even though on that leg they pay only the local fare for transportation between those two points. It has, of course, long been established that a continuous interstate journey, which takes place by different forms of transportation, is interstate commerce from start to finish, and that a carrier engaged in that commerce, however limited such commerce may be, is to that extent subject to the legislation of Congress.

> *The Daniel Ball*, 10 Wall. (77 U. S.) 557, 565 (1870).
>
> *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228 (1947).

This Court has held that it is the intention of the passenger or the shipper, as the case may be, not the form of his ticket or bill of lading, which determines the character of the commerce as interstate or intrastate. The rule is thus stated in *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349 (1917):

> "As this Court has often said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

In *Sprout* v. *City of South Bend, Ind.*, 277 U. S. 163 (1928), a case involving the status of bus passengers, this Court stated (168):

"The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce."

In *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166 (1922), the facts were that an interstate shipment was made to Oakley, Ohio, at which point the shipper took possession and reshipped to Madisonville, Ohio, paying a local rate on that intrastate leg of the shipment, although it had been his intention from the beginning that the shipment should go to Madisonville. There this Court said (171):

"Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply."

Accordingly, it was concluded that the through interstate rate was the only lawful rate and that (172):

"To permit the applicable through interstate rate to be defeated by use of a combination of intermediate rates would open wide the door to unjust discrimination. And it would unjustly deplete the revenues of the carrier."

Other Courts, both State and Federal, have recognized that the intention of the passenger, not the form of his ticket, determines his status as an interstate or an intrastate passenger.

Nast v. *San Antonio U. & G. Ry. Co.*, 261 S. W. 1011 (Tex. Com. App. 1924).

Illinois Cent. R. Co. v. *Holman*, 106 Miss. 449, 64 So. 7, 8 (1914).

Bush v. *Bremmer*, 36 F. 2d 189, 191 (C. C. A. 8, 1929).

Missouri K. & T. Ry. Co. v. *Ashinger*, 63 Okla. 120, 162 Pac. 814, 818 (1916).

Boston and M. R. R. v. *Cate*, 254 Mass. 248, 150 N. E. 210 (1926).

By issuing an order permitting the Civil Aeronautics Board to examine pertinent documents and records of an airline operating wholly within the State of New York, the Federal District Court in *Civil Aeronautics Board* v. *Canadian Colonial Airways*, 41 F. Supp. 1006 (S. D. N. Y., 1940), recognized the possibility that a physically intrastate air operation may be subject to the economic jurisdiction of the Board if it carries passengers on one leg of an interstate journey even though all of the airline's passengers traveled on local tickets between intrastate points. Subsequent to the decision in that case, the carrier concerned submitted to the entry of a consent decree permanently enjoining its operation (1941 Annual Report, Civil Aeronautics Board, pages 35-36).

The following question is therefore an important one raised by this appeal:

Is the Commission's order, insofar as it covers passengers on one leg of an interstate journey who paid local air coach fares for air transportation *via* United between the Los Angeles and San Francisco Bay areas in conflict

with federal regulation and beyond the Commission's jurisdiction?

This question is both substantial and federal and invites an authoritative decision by this Court.

B. The Order of the Commission, as Applied to United, Places Such a Direct Burden on Interstate Commerce as to Constitute a Violation of the Interstate Commerce Clause of the Constitution of the United States.

The second question set forth by the Commission (Motion, p. 8) as defining the issues before the Court in this appeal requires expansion. Stated accurately, the question is:

Does the order of the Commission regulating the fares charged interstate and intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I)?

This is the first time that question has been presented to this Court in connection with air transportation. It is a highly substantial federal question. As it relates to interstate air commerce, the question of the burden placed upon such commerce by state regulation is in a number of ways unique. Precedents established in other fields of transportation provide no sure basis for decision here. In *Chicago & Southern Air Lines* v. *Waterman S. S. Corporation*, 333 U. S. 103 (1948), this Court said (108):

> "However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

The Civil Aeronautics Board, through its Vice-Chairman Mr. Oswald Ryan, in a letter to the Director of the Aeronautics Commission of Indiana dated February 12, 1947, stated that appeals to the courts:

> "would, we believe, ultimately establish the principle that air transportation is so essentially national in character that any state regulation of this branch of the industry would constitute an improper burden upon interstate commerce." State Regulation of Economic Phases of Air Transportation—Views of the CAB, 14 Journal of Air Law and Commerce 356, 357 (1947).

The Commission in its motion has not treated the question of burden at all. Its discussion under the heading related to that question is limited to an attack upon the applicability of the well-established doctrine of Uniformity of Regulation and upon the contention that Congress has pre-empted the field of air carrier regulation—both questions presented by this appeal but quite separate from the question of burden (Motion, pp. 11-14).

The law is clear that under no circumstance can a State impose a direct burden on interstate commerce, and that if a State statute does impose such a burden the statute must fall even though Congress has not pre-empted the field.

> *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557, 571 (1886).
>
> *Minnesota Rate Cases*, 230 U. S. 352, 396, 400 (1913).

That such a burden may be present here seems apparent merely by reference to the following considerations:

1. If the Commission's views as to the scope of its authority were to prevail there could be two local air coach fares between the Los Angeles and San Francisco Bay areas in effect and binding on United at the same time, one applying to an interstate passenger (defined by the Com-

mission as one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey) and the other applying to an intrastate passenger (defined by the Commission as one whose entire journey is within the State of California) (Motion, pp. 7-8). The first fare would be subject to federal regulation, the second to state. Thus, if the Commission's interpretation of its power is correct, during the period from March 1 to May 9, 1951, United could not have charged an interstate passenger between Los Angeles and San Francisco less than $11.70 nor an intrastate passenger more than $9.95. United would have been faced with the impossible burden of distinguishing between the two types of passengers—each asking for the same local ticket between Los Angeles and San Francisco. Presumably, it could have inquired of each person purchasing a ticket whether he or she was an interstate or an intrastate passenger, but if the passenger had refused to disclose that information or had given the wrong information, United in most instances would have had no way of knowing the correct fare to charge and would act at its peril.

2. In determining the rates of compensation for the transportation of mail by aircraft the Civil Aeronautics Board is required by the Civil Aeronautics Act to take into consideration the need of the particular air carrier concerned for compensation for the transportation of mail sufficient "together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (Sec. 406(b), 52 Stat. 998, 49 U. S. C. 486). If a State may regulate the rates charged by such a carrier for the intrastate portion of its passenger traffic* and thus have it

* United provides scheduled air service between 136 pairs of cities in California alone.

within its power to compel a reduction in the carrier's "other revenue", the amount of mail revenue required will mount correspondingly. The direct burden of such regulation on this vital phase of interstate commerce, and indeed on the federal treasury itself, is therefore immediately apparent.

C. The Commission's Order Assumes Jurisdiction Over a Field of Economic Regulation of Air Carriers Engaged in Both Interstate and Intrastate Commerce Which Has Been Pre-empted by Congress Through the Civil Aeronautics Act of 1938.

The Civil Aeronautics Act contains a comprehensive grant of federal authority to the Civil Aeronautics Board which is invaded by the Commission's order. With reference to that Act, this Court stated in *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 105, 107 (1948):

> "Congress has set up a comprehensive scheme for regulation of common carriers by air * * *. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past."

Speaking broadly concerning the exclusiveness of federal control over air commerce, Mr. Justice Jackson stated, in a concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303 (1944):

> "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Air

> as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

The Declaration of Policy section of the Civil Aeronautics Act of 1938 (Section 2, 52 Stat. 980, 49 U. S. C. 402) requires the Board to consider, as being in the public interest and in accordance with the public convenience and necessity, the encouragement and development of an air transportation system properly adapted to the present and future needs of the domestic commerce of the United States, of the Postal Service, and of the national defense. With reference to that broad power, the court in *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* ..... F. 2d ....., 3 Avi. 17,702 (C. A. D. C. 1951) stated:

> "In the first place, Congress expressly directed that the Board consider, as being in the public interest and in accordance with the public convenience and necessity, the development, encouragement and promotion of air transportation, air commerce, and civil aeronautics. Whatever belittling significance may be attached to the fact that those provisions were under a title 'Declaration of Policy', they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute. Obviously development, promotion and encouragement are matters of foresight, not products of unblended hindsight."

In addition to its broad promotional powers, this Board is specifically required, in exercising its power "with respect to the determination of rates for the carriage of persons or property" to take into consideration the need in the public interest of adequate and efficient transportation of persons and property by air carriers and the need of each air carrier for revenue sufficient to enable such

carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service (Sec. 1002 (e), 52 Stat. 1018, 49 U. S. C. 642). The amount of revenue needed to provide adequate and efficient air service and to promote the development of an air transportation system properly adapted to the needs of commerce, the Postal Service, and the national defense—the tests prescribed by Congress for use in rate determination—may be substantially in excess of that thought necessary by a State public utilities commission, whose consideration may be limited to the question whether the rate is confiscatory. Congress could hardly have intended the tests it prescribed for use in rate making to be applicable only to a portion of the traffic carried by an air carrier engaged in both interstate and intrastate commerce. Such an interpretation of its action would frustrate the fundamental purpose of its legislation—the development of a sound national air transportation system.

The extent to which these broad grants of power to the Civil Aeronautics Board have pre-empted the rate regulatory authority which the States might otherwise exercise over air carriers engaged in interstate commerce and in the transportation of the United States mail is a question that no federal court has yet passed upon.

Admittedly the Civil Aeronautics Act provides no clear answer to this question. That is why this appeal is necessary. The Commission has referred the Court to a number of bills which have been introduced in Congress from time to time in an effort at clarification (Motion, pp. 17-18). Since none of those bills has as yet been enacted into law, however, this appeal is and must be concerned with an interpretation of the Act as presently written.

By seeking this appeal, United is not presenting "a bold attack upon our Federal form of government" as

the commission would have this Court believe (Motion, p. 19). United is seeking this appeal for the sole purpose of clarifying the existing confusion which exists as to the relative spheres of State and Federal regulatory control over its rates.

II.

COMPLIANCE BY UNITED WITH THE REPARATION ORDER OF THE COMMISSION WOULD VIOLATE THE PROVISIONS OF SECTION 403(b) OF THE CIVIL AERONAUTICS ACT OF 1938 (49 U. S. C. 483(b)) AND WOULD DEPRIVE UNITED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

As already observed, paragraph 2 of the Commission's reparation order applies to all of United's passengers paying local air coach fares for transportation between the Los Angeles and San Francisco Bay areas between the period from March 1 to May 9, 1951, and such passengers concededly included interstate passengers—*i. e.*, those whose flight between those areas was but one leg of an interstate journey. With respect to each such passenger United was prohibited by Sec. 403(b) of the Civil Aeronautics Act of 1938 as amended (52 Stat. 992, 49 U. S. C. 483) from charging or receiving less than the $11.70 specified in its then currently effective tariffs on file with the Civil Aeronautics Board. With respect to such passengers, United was forbidden by federal law from complying with the Commission's reparation order. Since the Commission was therefore clearly outside its jurisdiction in entering such order, the order unconstitutionally deprives United of its property without due process of law in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

United's voluntary actions have not created the situation in which it now finds itself, despite the Commission's assertion to the contrary (Motion, p. 20). Los Angeles and

San Francisco are both points served by United, and since United provides air transportation between those points as defined in the Civil Aeronautics Act (Sections 1(10), 1(21), 52 Stat. 977, 49 U. S. C. 401) its tariff showing the local fare between them was required by that Act to be filed with the Civil Aeronautics Board. United increased its air coach fare between those points from $9.95 to $11.70, effective March 1, 1951, on the specific recommendation of the Board that an increase in that amount be published to take effect on that day. As previously noted, the California Commission at the time that increase became effective, as well as at the time it entered its reparation order on April 24, 1951, was insistent that it had *exclusive* jurisdiction over that fare. The dilemma in which United found itself was therefore clearly not the result of United's voluntary action. Even if the Commission at that time had taken the position it takes today—that it has jurisdiction over the local fare only insofar as it applies to passengers whose entire journey is within the State of California—United would have been in an equally impossible dilemma clearly not the result of choice. For as has already been observed, United has no practical way of ascertaining which of its local-fare air coach passengers between the Los Angeles and San Francisco Bay areas are engaged on an interstate journey and which are not. Passengers are not under oath. Yet United in many instances would have to sell tickets on the sole reliance of a passenger's word, and at the peril of being in violation of both federal and state law if it made a mistake. The law is clear that the fact that a carrier may not have knowledge of the interstate character of its traffic does not change the character thereof.

Missouri-Kansas-Texas R. Co. v. *Northern Oklahoma Rys.*, 25 F. 2d 689, 697 (C. C. A. 8, 1928), cert. den. 278 U. S. 610 (1928).

B. & O. S. W. R. R. v. *Settle*, 260 U. S. 166 (1922).

III.

THE AVAILABILITY OF A PETITION FOR REHEARING OF THE CALIFORNIA SUPREME COURT'S ORDER BELOW DOES NOT AFFECT THAT ORDER'S FINALITY.

The question raised on page 6 of the Commission's motion as to whether United could have filed a petition for rehearing in the California Supreme Court following that Court's order declining review can be put to rest summarily. Regardless of whether a petition for rehearing is appropriate or possible under California procedure when the Supreme Court of that State has declined to review an administrative order, it is clear beyond doubt from the decisions of this Court that "finality" is in no wise affected by the possibility that the rendering court might reopen or revise its judgment.

Market St. Ry. Co. v. *Railroad Commission*, 324 U. S. 548 (1945).

IV.

CONCLUSION.

United respectfully submits that the questions presented in this appeal are substantial federal questions entitling United to invoke the jurisdiction of this Court.

WHEREFORE Appellant respectfully requests this Court to allow this appeal and to deny the motion of Appellee, The Public Utilities Commission of the State of California, to dismiss or affirm.

DATED at Los Angeles, California, December 6, 1951.

Respectfully submitted,

.....

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DEC 6 195

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 465

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE STATE OF CALIFORNIA

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner presents, with its Application for Allowance of an Appeal, this Jurisdictional Statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the orders and judgments of the Supreme Court of the State of California entered in this cause.

I

Opinions of the Supreme Court of the State of California and of the Public Utilities Commission

No opinion was issued by the Supreme Court of the State of California in denying Petitioner's petition for a Writ of Review of the order of Respondent, Public Utilities Commission of the State of California. A certified copy of the order denying a Writ of Review is attached to this Statement as Appendix A. No opinion was issued by the Su-

preme Court of the State of California in denying Petitioner's Petition for a rehearing of the order denying a Writ of Review. A certified copy of the order denying the rehearing is attached to this Statement as Appendix B. The opinion and order of Respondent, which Petitioner petitioned to have reviewed by the Supreme Court of the State of California, is attached to this Statement as Appendix C.

II

Statement of the Case

Petitioner, a federally certificated interstate commercial air carrier, on February 8, 1951, without admitting jurisdiction in Respondent, filed with Respondent an application for approval of an increase in its air coach tariff, effective March 1, 1951, from $9.95 to $11.70 for the transportation of a person between Los Angeles, California and San Francisco, California. The Los Angeles-San Francisco flight is over a segment of Petitioner's interstate federally certificated air route 63 between Los Angeles, California and Seattle, Washington.

On March 1, 1951, Petitioner, acting under applicable and mandatory provisions of the Civil Aeronautics Act of 1938, as amended, and applicable rules and regulations of the Civil Aeronautics Board, received permission to and did increase its air coach tariff between Los Angeles and San Francisco from $9.95 to $11.70. Had Petitioner charged less than $11.70 or if Petitioner were to refund any part of that tariff for tickets sold after March 1, 1951 Petitioner would be in violation of the Civil Aeronautics Act and subject to the penalties imposed by that Act.

On March 6, 1951, without having acted on Petitioner's application, Respondent ordered that an investigation be instituted into the reasonableness, lawfulness and propriety

of the fares, among other matters, of Petitioner and other parties, which matter was designated as Case Number 5271.

On April 24, 1951 Respondent issued its opinion and order in Case Number 5271, effective fifteen days later, May 9, 1951, purporting to authorize Petitioner to maintain an air coach tariff of $11.70 for the transportation of a person between the San Francisco Bay Airport and the Los Angeles Area Airport, and purporting to order Petitioner to make reparation, whenever possible, to passengers who had paid in excess of $9.95 for air coach transportation between Los Angeles and San Francisco from March 1, 1951, the date on which the increased tariff became mandatorily effective under the Civil Aeronautics Act of 1938, and May 9, 1951, the effective date of Respondent's order.

On May 7, 1951, in timely and legal manner, Petitioner presented to Respondent a petition for a rehearing relating to the Opinion and Order in Case Number 5271, which was denied on May 15, 1951.

On June 14, 1951 Petitioner filed with the Supreme Court of the State of California a verified Petition for a Writ of Review of the Order issued by Respondent on April 24, 1951. That petition was filed under the provisions of Section 67 of Act 6386 of Deering's General Laws of the State of California, which reads in part:

> "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined",

and under Section 1068 of the Code of Civil Procedure of the State of California and Section 4 of Article VI of the

Constitution of California. No other statutory provision exists for appealing Respondent's orders.

On August 2, 1951 the Supreme Court of the State of California denied Petitioner's petition for a Writ of Review. On August 16, 1951 Petitioner filed with the Supreme Court of the State of California a petition for a rehearing of the Order denying Petitioner's application for a Writ of Review of the Order in question. On August 30, 1951 the Supreme Court of California denied Petitioner's petition for a rehearing.

III

Statutory Provisions Believed to Sustain the Jurisdiction of the Supreme Court of the United States

The judgment of the Supreme Court of the State of California was entered August 2, 1951, and the Order denying Petitioner's petition for a rehearing was entered August 30, 1951. A Petition for Allowance of an Appeal will be presented to the Supreme Court of the State of California on October 26, 1951 concurrently with the filing of this Statement.

The jurisdiction of the Supreme Court of the United States to review by direct appeal the decision denying Petitioner's petition for a Writ of Review is conferred by Title 28, U. S. Code, Sections 1257 (2) and 2101 (c).

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review on direct appeal the Orders and Judgments of the Supreme Court of the State of California in this proceeding.

A. *The orders of the Supreme Court of the State of California are final judgments of the highest State Court.*

In *Napa Valley Electric Company* vs. *Railroad Commission of the State of California,* 251 U. S. 356, 64 L. Ed.

310, the Napa Valley Electric Company had made application to the Supreme Court of the State of California for a Writ of Review directed to the Railroad Commission of the State of California, the predecessor of the Public Utilities Commission of the State of California. The California Supreme Court denied the Petition for Review and refused to issue a Writ of Review.

> "And so with the denial of the Petition of the Electric Company,—it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of Section 67, and they could be exercised upon the display in the Petition of the proceedings before the Commission and of the grounds upon which they were assailed. And we agree with the district court that 'the denial of the Petition was necessarily a final judicial determination, based on the identical rights' asserted in that court and repeated here. 251 U. S. 356, 272-273; 64 L. Ed. 310, 313.
>
> * * * * * * *
>
> "That the court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented and its subsequent conclusive effect upon the rights of the Electric Company." 251 U. S. 356, 373; 64 L. Ed. 310, 314.

In commenting on the Napa Valley Electric case the court in *Adams* vs. *Decoto*, 21 Fed. 2d. 221, (Dist. Ct. S. D. Cal. S. D. 1927) stated:

> "In the case of *Napa Valley Electric Co.* v. *Railroad Commission of California*, et al., 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310, the Supreme Court of the United States held that, under Section 67 of the Public Utilities Act of California, as construed by the Supreme Court of the State, a petition to that court for a Writ

of Review to bring up proceedings of the Board of Railroad Commissioners, in which rates for electric power were fixed in alleged violation of constitutional rights and excess of the board's jurisdiction may be disposed of upon the merits by an order simply refusing the Writ, if the facts are fully stated in the petition; the provisions for issuing such Writ and for subsequent decision upon the record from the board not being mandatory in such cases.

"The Supreme Court there also further held that, in a suit brought in the United States District Court to enjoin enforcement of rates fixed by such board, it will be presumed that a petition, not in the record, upon which the state Supreme Court refused a Writ of Review, exhibited the board's proceedings and presented the questions which that court was empowered to decide, viz. whether the board pursued its authority and whether any constitutional right, state or federal, was violated, and that the order refusing the Writ will be deemed conclusive of such questions, although not accompanied by an opinion of the state court.

"The plaintiff, Adams, if he was not satisfied with the decision of the Supreme Court of California, could, had he elected to do so, have taken his case to the Supreme Court of the United States for adjudication, for that court expressly held, in the case of *Williams* v. *Bruffy*, 102 U. S. 248, at page 255, 26 L. Ed. 135, that 'whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a Writ of Error of Supersedeas, or by dismissing a Writ previously allowed. And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the

appellate court of the state, or to the inferior court whose judgment is reversed.'" Ps. 225-6.

The following cases confirm the point.

"The denial of a review by the State Supreme Court, [of a decision of the California Railroad Commission] to which application had been made pursuant to Gen. Laws Cal. 1931, title 464, Act. 6386, Section 67, is efficacious as an affirmance, to give finality to the Commission's Order . . ."

Southern Pac. Co. v. *Van Hoosear*, 72 Fed. 2d 903, 905 Circuit Court of Appeals, Ninth Circuit (1934)

"Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding, attach."

Williams v. *Bruffy*, 102 U.S. 248, 26 L. Ed. 135, 137.

B. *A state constitution is a statute within the meaning of 28 USCA 1257 (2).*
Delmas v. *Merchants' Insurance Co.*, 81 US 661; 20 L. Ed. 757, 759

C. *The validity of a California statute on the ground of its being repugnant to the Constitution of the United States has been drawn into question and the highest court of California has held it valid.*

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable by writ of error under sec. 237 of the Judicial Code."

Fiske v. *Kansas*, 274 US 380, 385; 71 L. Ed. 1108, 1111

IV

Manner by which Federal questions were raised.

The federal questions sought to be reviewed were raised first on March 14, 1951 at the commencement of the hearing before the Public Utilities Commission of the State of California. At that time Petitioner objected to the proceedings on the grounds that the Congress had pre-empted the field of commercial air transportation and that Respondent had no jurisdiction over Petitioner:

> "Congress has pre-empted this field and therefore has exclusive jurisdiction." (Rep. Tr. p. 8 ls. 14-15)
>
> "Mr. Hall: On behalf of Western Air Lines I would like to interpose the same observations and in addition, I would like to state, and I think it is important, that in so far as the investigation relates to the increase in tariff, coach tariffs, those increases were made by the request of the Civil Aeronautics Board and an appropriate tariff has been filed with that Board." (Rep. Tr. ps. 8 and 9 ls. 24-26 1-4)
>
> "Mr. Hall: I haven't had a chance to go over with what counsel expects as to the cease and desist order. It seems that (until) the Commission rules on the objections to the jurisdiction of this Commission that the Commission should not go ahead and issue a cease and desist order. I think there are serious objections raised here as to whether this Commission has jurisdiction and I think those issues should be met first before we go into the matter of cease and desist."
> (Rep. Tr. p. 31 ls. 2-9)

In addition, before submitting any evidence or participating in cross-examination Petitioner repeated its objection and announced that it was not waiving any legal rights:

> "Mr. Renda: I will get to that, Mr. Examiner. With respect to the legal question of whether the Public

> Utilities Commission of the State of California has jurisdiction over this matter, I would like to reiterate once again for the record that we have not changed our position in this regard and by participating in this hearing, by cross-examining witnesses made available, by representing testimony to the record and introducing evidence of our own, that we do not waive that particular legal right. We want it clearly understood that we are reserving that right too under the circumstances."
> (Rep. Tr. P. 65, 1s. 6-16)

Later, Petitioner renewed this contention in a more formal manner in a written brief filed with the Public Utilities Commission:

> "The Public Utilities Commission of the State of California may not investigate, fix or in any way regulate the intrastate fares of air transportation companies which are engaged in interstate commerce or the transportation of mail.
>
> "As to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive and State control is altogether inadmissible. *The Minnesota Rate Cases*, 230 U.S. 352 (1913). The development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense admits of no regulation except by a single authority. Interference by the State of California in the affairs of an interstate air carrier is, therefore, a direct burden on the national power.
>
> "Be that as it may, as to those subjects which permit diversity of treatment according to the special requirements of local conditions, the States may act until Congress chooses to occupy the field. *The Minnesota Rate Cases, supra.* It follows that Congress may constitutionally so legislate with reference to interstate subjects as to exclude that which otherwise might

clearly be within a State's province, such as the right to regulate the intrastate fares of an interstate carrier.

"It is Western's opinion that the Civil Aeronautics Act of 1938 is legislation having such effect and that, therefore, by reason of Congress' having totally occupied the field, California is precluded from regulating in any fashion air carriers coming within that Act. For one thing, air carriers engaging in the transportation of mail are subjected to Federal regulation. Section 1(2) and 1(10), *Civil Aeronautics Act*. Western's air transport operations are conducted pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board. Accordingly, all aircraft operated by Western carry or are available for the carriage of United States mail. Another indication is that every air carrier coming within the statutory definition is required to file with the Civil Aeronautics Board tariffs 'showing all rates, fares and charges for air transportation between points served by it.' Section 403, *Civil Aeronautics Act*. Such tariffs are not changeable except upon compliance with the provisions of Section 403(c) of the Act, which section contains no reference to and therefore excludes conditions imposed by State law." (Memorandum of Western Air Lines, Inc. ps. 2-4.)

The opinion and order of Respondent, issued on April 24, 1951 (P. 3-4; P. 8; P. 12) denies the validity of the federal questions thus presented by Petitioner and holds that the Civil Aeronautics Act of 1938, as amended, and the Commerce Clause of the Constitution of the United States (Article I, Section 8, Paragraph 3) do not deprive Respondent of jurisdiction.

The federal questions also were raised in Petitioner's petition for rehearing before the Public Utilities Commission to the State of California:

"The Commission erred in finding and concluding that the Civil Aeronautics Act of 1938, as amended,

does not purport to extend Federal regulation to the matter of rates and fares charged for the intrastate transportation of persons or property under authority of certificates of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the provisions of said Act.

* * * * * * *

"Because all revenues realized from the carriage of persons or property, regardless of the class of carriage, enter into the determination of air mail 'compensation,' it follows that regulation of air mail 'compensation' necessarily involves regulation of all rates and fares which produce non-mail revenues. Congress, therefore, clearly extended the regulatory authority of the Civil Aeronautics Board to the intrastate rates and fares of air carriers engaged in the transportation of United States mail. Moreover, the developmental and regulatory objectives of the Civil Aeronautics Act would be forsaken if control in any part of the rates and fares of such carriers operating pursuant to Federal authority were not subject to exclusive regulation by the Civil Aeronautics Board." (ps. 2-3)

Petitioner again raised the federal questions in its Petition for Writ of Review filed with the Supreme Court of the State of California:

"The Order of Respondent to which this Petition for a Writ of Review is addressed is unlawful and should be annulled because:

"1. The Civil Aeronautics Act of 1938, as amended, necessarily has pre-empted the entire field of civil aviation to the exclusion of the right or power of any State or any State Agency to exercise jurisdiction or authority over commercial air transportation.

"2. The Order of Respondent so far as it purports to affect Petitioner is a burden on interstate commerce and is in violation of subsection 3 of Section 8, Article I of the Constitution of the United States." (p. 14)

V

Basic Questions Presented

The basic questions which will be presented by the appeal, to one or the other of which each of the assignments of error listed in the Assignment of Errors compiled under Rule 9 of the Rules of the Supreme Court of the United States is related, are:

1. Has the Civil Aeronautics Act of 1938, as amended (52 Stat. 977; 49 USC 401 et seq), pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

2. Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an interstate segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of Subsection 3 of Section 8, Article I of the Constitution of the United States?

VI

The Questions Involved are Substantial

The primary question involved, whether the activities of commercial air lines are to be controlled by the States as well as the federal government, is one of wide import affecting not only Petitioner but also all other commercial air carriers. A decision of the Supreme Court of the United States upholding the exclusive jurisdiction of the federal government under the Civil Aeronautics Act of 1938, or at least casting light on where federal control ends and state control starts, is essential to the welfare of the air transportation industry.

The decision of the Supreme Court of the State of California is at war with the construction placed upon the Civil

Aeronautics Act of 1938, as amended, by the Civil Aeronautics Board, under which the Civil Aeronautics Board has exercised jurisdiction over all activities of certificated air carriers for many years. The effect of the decision challenged thus is to create a confused situation with both a federal and a state agency attempting to exercise control over the same activities of air carriers. The merit to Petitioner's position that the Civil Aeronautics Act of 1938 has so occupied the field that state regulation is not to be permitted is fully supported by the sections of the Act set forth in Appendix D.

Petitioner, recognized as the oldest commercial air line in the United States, celebrated its twenty-fifth anniversary on April 17, 1951. In this relatively short span of time the commercial air transportation industry has grown from a jest-inspiring private venture to one of the most important national public utilities in the country. Its indispensability to the transportation of mail is conceded. Its importance to the national defense was proved with high laurels during the last war and is being reproved by the current Korean conflict and the defense program. Yet case law lags sadly behind the industry's quick maturity.

Much state legislation now claimed to apply to air transportation was enacted with an eye only upon ground transportation, to which air transportation bears but remote and minor relationship. What might have been good for the railroads or the buslines, or what might have advanced the public welfare as wedded to ground transportation, too often, if forced into application, would burden the air lines and undermine the public welfare concerning air transportation.

Today the commercial airplane will leave New York and land in Los Angeles between dawn and dusk and in the process will cross a dozen states. The best train takes

three days and three nights, and the best bus four days and three nights to do the same job. Thus it is that the air transportation industry, to a vastly greater extent than any type of ground transportation, must be guided by only one master and must be freed completely from the shackles of forty-eight separate state masters. Otherwise interstate commerce in the air will not simply be burdened, it will deteriorate completely.

It is unthinkable that a tolerable condition could exist in commercial air transportation with forty-eight different sets of safety regulations superimposed on one set of federal safety regulations. Federal regulations provide that north bound and east bound instrument flights shall be at the odd thousand level, with south bound and west bound flights at the even thousand level when not flying on a controlled airway. If each state were to exercise sovereignty of the skyways and decide independently of all other states and of the federal government at what level flights should be maintained during instrument flying, blind flying, including night flying, would come to an end. Recognizing the absolute necessity for a single safety director no state has yet had the temerity to challenge the exclusive power of the federal government in the area of air traffic safety. Should the issues here involved be not decided firmly and correctly that temerity may soon disappear.

From the standpoint of lives and limbs conflicting economic regulations might not be as destructive or as deadly as conflicting safety regulations. But from the standpoint of the efficiency, the financial stability and the survival of the air transportation industry under private ownership uniformity of economic regulations is just as important as uniformity of safety regulations.

Each federally certificated air route is a combination of intrastate segments. If it be held that each state has control

over the tariff which may be charged by air carriers for transportation of persons or property over intrastate segments, the Civil Aeronautics Board will lose effective control of its power to fix the rates for the transportation of mail as granted by Section 406 of the Civil Aeronautics Act (49 U.S. Code 486). All income of air carriers, including revenue from intrastate transportation, has to be considered in determining the mail rate. This makes it quite plain that the Congress did not intend that the states should have any control over intrastate tariff which necessarily would vest indirect but effective control over air mail rates. The cumulative effect on air mail rates if each of the forty-eight states controlled the passenger and freight tariffs over intrastate segments of federally certificated air routes requires no amplification.

If the air transportation industry must come to heel before forty-eight little Civil Aeronautics Boards in addition to the federal Civil Aeronautics Board and comply with the tariff rates and regulations and with the conditions of labor and the other economic regulations which each independently chooses to impose within the confines of its own territorial boundaries, chaos will be complete and single federal ownership will become the only solution.

It is of compelling importance to the air transportation industry that a decision of the Supreme Court of the United States be issued declaring that commercial air transportation in all of its phases is constitutionally exempt from state control or interference.

VII

Statutes Involved

The issues involve the constitutional validity of Sections 17, 20, 21, 22, 23 and 24 of Article XII of the California Constitution as applied to certificated air carriers.

Petitioner takes the position that these sections are not applicable to air carriers because they are in conflict with the commerce clause of the Constitution of the United States and in conflict with certain sections of the Civil Aeronautics Act of 1938, as amended, which Act petitioner contends pre-empts the entire field of civil aviation.

The six sections of Article XII of the California Constitution which are involved are set forth verbatim in Appendix D. In addition Appendix D sets forth verbatim Paragraph 3, Section 8, Article I of the Constitution of the United States and Sections 2, 205(a), 301, 401(a), 403(a), 403(b), 403(c), 404(a), 601(a), 902(a), 902(d), 1002(d), 1005(e) of the Civil Aeronautics Act of 1938, as amended, (49 U.S.C. Sections 402, 425(a), 451, 481, 483, 483(b), 483(c), 484(a), 551(a), 622(a), 622(d), 642(d), 645(e)), which are in conflict with the designated sections of Article XII of the California Constitution and which disclose that the Civil Aeronautics Act necessarily has pre-empted the entire field of commercial air transportation.

October 26, 1951.

Respectfully submitted,

HUGH W. DARLING,
Counsel for Petitioner.

GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

EXHIBIT "A"

ORDER DENYING WRIT OF REVIEW

S.F. No. 18427

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

WESTERN AIR LINES, INC.

v.

PUBLIC UTILITIES COMMISSION, ETC.

Petition for writ of review DENIED.

Edmonds, J. Carter, J. voting for issuance of a writ.

GIBSON,
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of October A.D. 1951.

WILLIAM I. SULLIVAN, *Clerk*

[SEAL] By A. R. FAIRWELL,
Deputy Clerk

EXHIBIT "B"

Order due Sept. 1, 1951

ORDER DENYING REHEARING

S.F. No. 18427

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

WESTERN AIR LINES, ETC.

v.

PUBLIC UTILITIES COMMISSION, ETC.

Petitioner's application for rehearing DENIED.

Edmonds, J. Carter, J. and Spence, J. voting for a rehearing.

GIBSON,
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of October A.D. 1951.

WILLIAM I. SULLIVAN, *Clerk*

[SEAL] By A. R. FAIRWELL,
Deputy Clerk

EXHIBIT "C"

Decision No. 45624

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5271

Investigation Into the Fares, Rules, Regulations, Charges, Services, Operations and Practices of Arrow Airways, Inc.: California Central Airlines; KENNETH G. FRIEDKIN, Doing Business as Pacific Southwest Airlines; Robin Airways, Inc.; Southwest Airways Company; Transcontinental & Western Air, Inc.; United Air Lines, Inc. and Western Air Lines, Inc.

APPEARANCES

Ray E. Costello, for Southwest Airways Company, respondent.

Donald Keith Hall and D. P. Renda, for Western Air Lines, Inc., respondent.

Kenneth G. Friedkin, for Pacific Southwest Airlines, respondent.

John W. Preston, Jr., for California Central Airlines, respondent.

Charles Stearns, for United Air Lines, Inc., respondent.

David G. Shearer, for Trans World Airlines, Inc., respondent.

Norman D. Kessler, for Robin Airways, Inc., respondent.

Wilson E. Cline, C. H. Jacobsen and Thomas A. Hopkins, for the staff of the Public Utilities Commission of the State of California.

OPINION

This proceeding is an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the

transportation of passengers between the San Francisco Bay area and the Los Angeles area.

Public hearings were held before Commissioner Craemer and Examiner Bryant at Los Angeles on March 14 and 27, 1951. Briefs have been filed. The matter is ready for decision.

This investigation was instituted by the Commission upon receipt of information that fares were being assessed for socalled "coach" transportation in excess of those named for such service in the tariffs on file with the Commission. The eight air carriers maintaining published fares between the San Francisco and Los Angeles areas were made respondents.

Factual evidence was offered by representatives of various of the carriers and by members of the Commission's staff. The record shows that certain of the respondents are not offering the coach services with which this investigation is primarily concerned. Arrow Airways, Inc., is no longer operating common carrier service of any nature, and has requested that the tariff which it heretofore filed for California operations be canceled.[1] Similarly, a member of the Commission's staff testified that the operations of Robin Airways have been suspended or discontinued. Southwest Airways Company and Trans World Airlines, Inc. (formerly Transcontinental & Western Air, Inc.) have no coach operations between California points, and there is no evidence in this proceeding that either of these companies has made any unauthorized increase in fares or otherwise operated unlawfully or improperly. Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, operates a coach service between the San Francisco and Los Angeles areas. The record shows that his fare for this service was maintained at $9.95 until March 28, 1951, on which date he increased it to $11.70, under authorization from this Commission.[2] The evidence is clear that Friedkin properly continued to assess and collect the lower fare until his tariff was lawfully amended. As to these three car-

[1] Exhibit No. 6.

[2] Authority No. 21-12-121 of March 20, 1951.

riers the investigation may be discontinued upon cancellation of the inoperative tariffs.

The remaining respondents are California Central Airlines, United Air Lines, Inc. and Western Air Lines, Inc. As to these three carriers the essential facts are similar and undisputed. Each of them operates coach flights between the San Francisco and Los Angeles areas. For some time prior to March 1, 1951, California Central Airlines maintained for this service a one-way fare of $9.99 and the other two companies maintained a fare of $9.95. Effective with that date each of the companies started to collect and thereafter continued to collect a fare of $11.70. Each of the companies had filed with the Commission, prior to March 1, an application seeking authority to make the fare increase. None of the applications had been granted prior to March 1, nor have they yet been granted.[3]

At the conclusion of the taking of evidence the Commission's staff moved that the Commission promptly issue a preliminary order requiring the three respondents (1) to cease and desist charging passenger fares for air line coach travel in excess of the authorized fares set forth in their tariffs on file with the Commission, (2) to prepare and maintain a record of the names and addresses of all persons from whom more than the authorized fares have been or may be collected subsequent to February 28, 1951, and (3) to make reparation of the excess of the unauthorized fares over the authorized fares to all passengers whose names and addresses are reasonably ascertainable. Replies to the motion were, by agreement, incorporated in the briefs filed by the three respondents.

At the hearing and in their briefs the three carriers urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the com-

[3] It was these circumstances which impelled the institution of this proceeding.

panies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion.

The jurisdictional question may be considered first. The respondents argue on various grounds that the provisions of Article XII of the California Constitution are not applicable to air carriers, that the constitutional sections are not self-executing, and that the California legislature has not made a specific grant of power to the Commission to regulate air carriers. United Air Lines, Inc., and Western Air Lines, Inc., assert further that the regulation of air commerce is a field which has been completely occupied by the Federal government under the Civil Aeronautics Act of 1938. United Air Lines, Inc., advance the additional argument that its operations in question are interstate in nature.

Article XII of the California Constitution contains many provisions which are pertinent to the jurisdictional question. Section 17 of said Article provides that, "All railroad, canal, and other transportation companies are declared to be common carriers, . . ." Section 23 of said Article, in part, states "every common carrier, is hereby declared to be a public utility . . ."

The staff on cross-examination of witnesses for the airlines developed the fact and we now find that the three air carriers, California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., which have increased their coach fares without Commission authorization offer their services to the public in general. Counsel for United Air Lines, Inc., in their brief admit that United is a common carrier.

In the recent case of *State ex Rel. State Railway Commission* v. *Ramsey* (1949), 151 Nebr. 333, 27 N. W. (2d) 502, the Supreme Court of Nebraska in considering whether air carriers are common carriers as that term is used in the Nebraska Constitution laid down the following principles:

> ". . . A Constitution is intended to meet and be applied to any conditions and circumstances as they

> arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply to all things to which they are in their nature applicable. . . . These principles have been held to be applicable to transportation by air. . . . Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier" (p. 338 Nebr. Reports).

The California Supreme Court had under consideration in *Western Association of Short Line Railroads* v. *Railroad Commission* (1916), 173 Cal. 802, 162 Pac. 391, the question whether companies engaged in the then new businesses of transporting freight in motor trucks and passengers in automobile stages were "other transportation companies" referred to in Article XII of the California Constitution. The Court unequivocally held that they were public transportation companies, common carriers, and public utilities.

In light of the foregoing cited constitutional provisions and judicial decisions, we find and hold that the herein air carriers operating under coach fares between the Los Angeles area and the San Francisco Bay area are transportation companies, common carriers and public utilities.

We now turn to the question whether the Public Utilities Commission has jurisdiction over the air carriers with respect to increases in fares charged for transportation between points within the State of California.

Section 20 of Article XII of the California Constitution, in part, provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad

commission provided for in this Constitution, that such increase is justified, . . ."

Section 22 of Article XII of the California Constitution, in part, provides:

> "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission than the rates, fares and charges which are specified in such tariff. . . ."

In the *Short Line Railroads* case, supra, the Supreme Court ordered that a peremptory writ of mandate issue requiring the Commission to assume the jurisdiction conferred by the above-quoted portion of Section 22. With reference to the absence of enabling legislation, the Court stated at page 804:

> "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant."

That decision is a clear statement that the provisions of said Section 22 of the constitution are self-executing, and that the Commission must exercise the authority therein conferred regardless of any absence of legislative enactments. While the Court did not refer to Section 20, there is no reason why the same construction would not be given that section.

Various of the respondents have referred to *In Re Martinez* (1943), 22 Cal. (2d) 259, 138 P. (2d) 10, as being contrary to the principles above set forth. It is true that the *Martinez* case contains dictum to the effect that the

Commission may exercise jurisdiction only where such jurisdiction is given by the legislature. However, in the *Martinez* case the Court had under consideration Section 23 of Article XII which reads, in part, as follows:

> ". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The grant of jurisdiction to the Commission over intrastate rates of air carriers is found in Sections 20 and 22 of Article XII of the constitution. The provision quoted from Section 23 of said Article can claim no priority over Sections 20 and 22 of said Article unless the former provision is more specific than the latter. As a matter of fact the latter are more specific than the former with respect to the regulation of rates of "other transportation companies." Should there be any possible ground for doubt on this point the provisions of Section 23 are conclusive against the contentions of respondents. Said Section 23 further provides, in part, as follows:

> ". . . Nothing in this section (Section 23 of Article XII) shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

In the face of these plain and unambiguous provisions of the constitution and in view of the holding in the *Short Line Railroads* case, supra, the dictum in the *Martinez* case cannot be considered as establishing a rule of law contrary thereto.

The Civil Aeronautics Act does not purport to extend economic regulation to intrastate transportation of persons

or property other than mail. The states are therefore free to regulate intrastate rates and fares of air carriers to the same extent as they regulate intrastate rates and fares of railroads, trucking and bus companies, and telephone and telegraph utilities. (Cooley v. Board of Port Wardens (1851), 12 How. (U. S.) 299, 13 L. ed. 996; Minnesota Rates Cases (1913), 230 U. S. 352, 57 L. ed. 1511; Eicholz v. Public Service Commission (1939), 306 U. S. 268, 83 L. ed. 641; Smith v. Illinois Bell Telephone Co. (1930), 282 U. S. 133, 75 L. ed. 255; Lindheimer v. Illinois Bell Telephone Co. (1934), 292 U. S. 150, 78 L. ed. 1182.)

Based upon the law and the facts we hold that the jurisdiction of the Commission in the premises is clear and that such jurisdiction should be exercised. The contention of respondents to the contrary we hold to be without merit.

A number of exhibits were submitted in justification of the reasonableness of the $11.70 fare. Among these was a 17-page interdepartmental memorandum of the Civil Aeronautics Board consisting essentially of estimates of revenues generated and expenses incurred by United Air Lines, Inc., and Western Air Lines, Inc., for air coach operations on the Pacific Coast. According to this memorandum, United incurred a loss of $73,461 in the San Francisco-Los Angeles operations for the period May through August, 1950, and Western similarly incurred a loss of $27,478 for the period June through August, 1950.[4] It was pointed out that the fare of $11.70 represents an increase of approximately one-half cent per passenger mile over the $9.95 fare, and that it results in a per-mile fare of about 3½ cents. According to the Civil Aeronautics Board, this contrasts with recently increased fares of 4½ cents per passenger mile now generally prevailing throughout the rest of the country for air coach services. The record in this proceeding is clear that the $11.70 fare was developed, recommended, and in fact urged upon the carriers by that Board.

United Air Lines, Inc., through its traffic manager, introduced additional evidence concerning the operation of its coach flights between the San Francisco and Los Angeles

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[4] The estimated losses are on the basis of fully allocated costs.

areas. For its revenue and expense allocations, however, this company offered only the aforesaid analysis made by the staff of the Civil Aeronautics Board. United did not submit comparable estimated results for the future. The following table shows actual operating experience at the $9.95 fare as developed by the Board's staff and submitted by the company. A second column shows, for comparative purposes, the results which would have obtained for the same period if the higher fare had applied and all other conditions were unchanged.

UNITED AIR LINES, INC.

(Four Months Ending with August, 1950)

	Actual Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare	
Revenues	$549,629	$549,629	
Additional Revenue from Increased Fare	.....	(1) 96,735	
Total Operating Revenues	$549,629	$646,364	
Operating Expenses			
Flying Operations	$121,884		
Direct Maintenance Flight Eqpt.	36,549		
Depreciation—Flight Eqpt.	63,378		
Ground & Direct Maintenance	38,160		
Ground Operations	90,083		
Stewardesses' Salaries & Expense	8,054		
Passenger Insurance & Supplies	9,847		
Traffic and Sales	90,529		
Advertising and Publicity	11,703		
General and Administrative	47,881		
Depreciation—Ground Eqpt.	16,925		
General Headquarters Expense	88,097		
Total Operating Expense	$623,090	$623,090	(2)
Net Operating Profit (3)	($73,461)	23,274	
Operating Ratio (3)	113.4%	96.4%	

( ) Denotes Loss

(1) Revenue resulting from a 17.6 per cent increase in fares.
(2) Carrier did not submit 1951 estimated expenses.
(3) Before federal income taxes.

The director of budgetary controls of Western Air Lines, Inc. introduced and explained an exhibit showing month-by-month results of coach operations between the San Francisco and Los Angeles areas for the nine months from June, 1950, through February, 1951. The increase in passenger revenues, assuming a fare of $11.70 instead of $9.95, was included, but this company, like United, did not submit estimated revenues or expenses for the future. The actual and adjusted figures for Western Air Lines, Inc. are shown in the table which follows:

WESTERN AIR LINES, INC.
(Nine Months Ending with February, 1951)

	Actual (1) Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare	
Revenues	$1,063,527	$1,063,527	
Additional revenue from increased fare		184,793	(2)
Total Operating Revenue	$1,063,527	$1,248,320	
Operating Expenses:			
Flight Operations	$263,881		
Direct Maintenance	94,114		
Depreciation of Flight Eqpt.	126,000		
Indirect & Ground Expense	683,770		
Total Operating Expenses	$1,167,765	$1,167,765	(3)
Net Operating Profit (4)	(104,238)	$80,555	
Operating Ratio (4)	109.8%	93.6%	

( ) Denotes Less.

(1) February costs based on January experience prorated for 28 days.
(2) Additional revenue resulting from the increased fare as estimated by the witness.
(3) Carrier did not submit 1951 estimated expenses.
(4) Before federal income tax.

California Central Airlines, which operates wholly within the State of California, derives approximately 90 per cent of its revenue from coach flights between the San Francisco and Los Angeles areas. The operations of this company were not included in the staff report of the Civil Aeronautics Board. Exhibits submitted by the company show revenues, expenses, and estimated costs, as well as various plane-mile and passenger-mile data. According to

the evidence, the company earned in the year 1950 a net profit of $1,512; and, if the higher fare and certain increased expenses had been in effect during the year, would have received an estimated net profit of $20,104. The operating ratios would be 99.8 per cent and 98.0 per cent, respectively. The figures as submitted by this company are summarized in the following table:

CALIFORNIA CENTRAL AIRLINES
(Twelve-Month Period)

	Year 1950 Actual Experience at $9.99 Fare	Year 1951 Estimated Experience at $11.70 Fare	
Operating Revenues	$855,145	$981,371	(1)
Operating Expenses:			
Flying Operations	$605,290		
Ground Operations	31,508		
Ground & Indirect Maintenance	8,995		
Passenger Service	15,600		
Traffic and Sales	114,806		
Advertising & Publicity	31,537		
General & Administrative	44,564		
Depreciation—Ground Property	1,333		
Total Operating Expenses	$853,633	$961,267	(2)
Net Operating Revenues (3)	$1,512	$20,104	
Operating Ratio (3)	99.8%	98.0%	

(1) Revenue resulting from the 17.1 per cent increase in fares and an estimated diminution of five per cent in the number of passengers carried.
(2) The estimated expenses for 1951 were not segregated by accounts.
(3) Before federal income tax.

None of the companies supplied all of the supporting or underlying data which would be desirable. Nevertheless, considering all of the circumstances of record, the evidence is convincing, and we find as a fact, that the higher fare is justified. Publication, filing and maintenance of the fare will be authorized.

It is entirely clear, however, and indeed it is not disputed, that California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., increased their fares without first receiving authorization from this Commission. Timely requests for authority to make the increase were filed, but the showings required by the state constitution were made belatedly, and were incomplete at the time the instant

investigatory proceeding was instituted and notice thereof served upon the respondents. The order which follows will authorize publication and maintenance of the $11.70 fare for the future. These companies are hereby placed on notice that they are and will hereafter be deemed to be "transportation companies" within the meaning of the Constitution of the State of California, and that they are subject to the prohibitions and requirements of said constitution. We also call the attention of these companies to Section 76(a) of the Public Utilities Act, which provides:

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

In view of the fact that these air carriers since March 1, 1951, have been charging fares in excess of the fares reflected by their tariffs on file with this Commission as applied to coach operations between the San Francisco Bay area airports and the Los Angeles area airports, we are of the opinion that amounts collected in excess of such tariff fares should be refunded, wherever possible, to passengers who have paid the same and such direction will be incorporated in the order following this opinion. Sections 20, 21 and 22 of Article XII of the State Constitution require that such reparation be made.

There is some evidence, not hereinbefore discussed, relative to possible failure of some of the respondents to comply strictly with their filed tariff rules governing refunds or exchanges of unused tickets. This subject was subordinate to the basic issues in this proceeding, and the evidence thereon was in any event inconclusive. On this subject we make no finding of fact.

ORDER

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

IT IS HEREBY ORDERED:

1. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby authorized to publish, file and maintain a one-way adult coach fare of $11.70 for transportation of passengers between San Francisco Bay area airports on the one hand and Los Angeles area airports on the other hand.

2. That California Central Air Lines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby ordered to make reparation, wherever possible, to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand and the Los Angeles area airports on the other hand, in excess of the fares as reflected by the tariffs of these air carriers on file with this Commission.

3. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., and all other of the respondents operating as common carriers, be and they are hereby adjured and admonished that they may not, for the transportation of passengers and property in intrastate commerce between points within the State of California, raise any rate of charge under any circumstances whatsoever except upon a showing before the Commission that such increase is justified, make unreasonable charges, discriminate in charges or facilities, nor in any other manner violate any of the provisions of Article XII of the Constitution of the State of California applicable to transportation companies.

4. That tariffs heretofore filed with this Commission by Arrow Airways, Inc., and Robin Airways, Inc., naming fares, rules and regulations governing transportation of passengers between points in this state, be and they are hereby canceled.

5. That the several pending motions for dismissal of the proceeding as to particular respondents, and the pending motion for issuance of a "preliminary order", be and they are hereby denied.

6. That, upon the effective date of this order, this investigation be and it is hereby discontinued.

The Secretary is hereby directed to cause a certified copy of this decision forthwith to be served personally on Arrow Airways, Inc., California Central Airlines, Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, Robin Airways, Inc., Southwest Airways Company, Trans World Airlines, United Air Lines, Inc., and Western Air Lines, Inc.

The effective date of this decision shall be fifteen (15) days after the date hereof.

Dated at San Francisco, California, this 24th day of April, 1951.

R. E. Mittelstaedt,
Justus F. Craemer,
Harold P. Huls,
Kenneth Potter,
Peter E. Mitchell,
Commissioners.

APPENDIX "D"

CALIFORNIA CONSTITUTION

Article XII

Sec. 17. All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation, organized for the purpose, under the laws of this State, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other

railroad, and shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

SEC. 20. No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the Railroad Commission provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.

SEC. 21. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. The Railroad Commission shall have power to authorize the issuance of excursion and commutation tickets at special rates. Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation

to any shipper on account of the rates charged to said shipper being excessive or discriminatory; provided, no discrimination will result from such reparation.

SEC. 22. The Railroad Commission is continued in existence and the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; provided, that the Legislature, in its discretion, may divide the State into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and provided further that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the Governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the Legislature. Commissioners appointed for regular terms shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All

of said commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of Public Utilities Commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of

accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "Railroad Commission Act" of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five Commissioners provided for herein.

Whenever in this Constitution or the laws of this State "Railroad Commission" is used, it shall be deemed to refer to the Public Utilities Commission.

SEC. 23. Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Rail-

road Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and country, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the Railroad Commission as provided by law; and provided, further, that where any such city and county or incorporated city or town shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the Railroad Commission in the manner prescribed by the Leg-

islature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. Nothing in this section shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith.

SEC. 24. The Legislature shall pass all laws necessary for the enforcement of the provisions of this article.

UNITED STATES CONSTITUTION

PARAGRAPH 3, SECTION 8,

ARTICLE I

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

CIVIL AERONAUTICS ACT OF 1938 AS AMENDED (49 U. S. CODE 402 et seq)

SEC. 2. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

SEC. 205(a) (49 U. S. Code 425(a)). The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

SEC. 301 (49 U. S. Code 451). The Administrator of Civil Aeronautics is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator of Civil Aeronautics shall cooperate with the Board in the administration and enforcement of this Act.

SEC. 401(a) (49 U. S. Code 481). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

SEC. 403(a) (49 U. S. Code 483). Every air carrier . . . shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. . . .

SEC. 403(b) (49 U. S. Code 483(b)). No air carrier . . . shall charge or demand or collect or receive a greater or less or different compensation for air transportation . . . than the rates, fares, and charges, specified in its currently effective tariff; and no air carrier . . . shall, in any manner or by any devise, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified. . . .

SEC. 404(a) (49 U. S. Code 484(a)). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor . . . ; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, . . .

SEC. 601(a) (49 U. S. Code 551(a)). The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interests of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing and overhaul; and (C) in the discretion of the Board, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Board may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Board may find necessary to provide adequately for safety in air commerce.

(7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.

SEC. 902(a) (49 U. S. Code 622(a)). Any person who knowingly and willfully violates any provision of this Act (except titles V, VI and VII, or any order, rule, or regulation issued under any such provision or any term, condition or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

SEC. 902(d) (49 U. S. Code 622(d)). Any air carrier or foreign air carrier, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this Act, or who, by any device or means, shall, knowingly and willfully, assist, or shall willingly suffer or permit, any person to obtain transportation or services subject to this Act at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000.

SEC. 1002(d) (49 U. S. Code 642(d)). Whenever, after notice and hearing, . . . the Board shall be of the opinion

that any individual or joint rate, fare, or charge demanded, . . . by any air carrier for interstate or overseas air transportation, . . . is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge . . . thereafter to be demanded . . .

SEC. 1005(e) (49 U. S. Code 645(e)). It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Board under this Act affecting such person so long as the same shall remain in effect.

DEC 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 465

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18,427

WESTERN AIR LINES, INC.,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent-Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of Western Air Lines, Inc., petitioner and appellant (hereinafter referred to as Western), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Western is regularly engaged as a common carrier in the business of carrying passengers by air. Among others its operations include both standard and coach-class flights

between the Los Angeles area airports and the San Francisco Bay area airports and vice versa. On its coach-class flights between these airports Western carries passengers whose journeys are wholly within the State of California and passengers whose flights are only segments of interstate journeys, but on these air coach flights Western carries no U. S. mail.

Western has had tariffs covering its intrastate operations continuously on file with the Commission since June 21, 1945. The fares under consideration in this appeal are the one-way adult fares for coach-class passenger air service between the Los Angeles area airports and the San Francisco Bay area airports.

These same fares were the subject of investigatory proceedings instituted on the Commission's own motion against various air carriers in 1949, in which proceeding both Western and its subsidiary Western Air Lines of California made appearances. In Decision No. 43932 (March 14, 1950), 49 Cal. P. U. C. 494, issuing out of this proceeding, the Commission found that it had authority to institute such proceedings under Article XII of the California Constitution and pursuant to such authority the Commission found that the one-way fares of $9.95 and $9.99 then being charged had been shown to be reasonable.

Subsequently Western made application to the Commission by letter dated February 7, 1951, to increase its intrastate one-way adult coach-class fares between Los Angeles and Oakland/San Francisco from $9.95 to $11.70 to be effective March 1, 1951. The letter stated that the application was being made under the authority of Section 20, Article XII of the California Constitution.

Shortly thereafter and before March 1, 1951, United Air Lines, Inc. (hereinafter called United), Pacific Southwest Airlines and California Central Airlines, the only other air

carriers operating under coach-class fares between the Los Angeles area and the San Francisco Bay area, mailed applications to increase their intrastate one-way adult coach-class fares to $11.70 on March 1, 1951.

The evidence subsequently introduced at the Commission hearings showed that all these applications for fare increases had been filed pursuant to request by the Civil Aeronautics Board that these air carriers increase their coach-class fares between the Los Angeles area and the San Francisco Bay area to $11.70 effective March 1, 1951. That the Civil Aeronautics Board intended these requests to apply to intrastate fares is made clear by the fact that they were directed to Pacific Southwest Airlines and California Central Airlines, both of which are noncertificated air carriers engaged solely in intrastate operations wholly within the State of California, as well as to United and Western.

As the information submitted in support of the various applications filed with the Commission was not sufficient to warrant the ex parte authorization of the requested increases, the tendered tariff pages were rejected. Nevertheless, on March 1, 1951, California Central Airlines, United and Western proceeded to increase their fares to $11.70 without Commission authorization. As a result on March 6, 1951, the Commission issued its order of investigation.

Hearings were held in Los Angeles on March 10 and March 27, 1951. At the outset and throughout the course of the hearings, California Central Airlines, United and Western made clear their contention that the Commission had no jurisdiction over their fares, United and Western both claiming lack of jurisdiction by reason of the Federal Constitution as well as the California Constitution. However, at the March 27, 1951, hearing all three did submit evidence in justification of the intrastate coach-class fare

increases and sought Commission approval of the applications which previously had been filed.

On March 19, 1951, Pacific Southwest Airlines refiled its application, this time with sufficient supporting data to enable the Commission to act favorably thereon. On March 20, 1951, the Commission ex parte authorized Pacific Southwest Airlines to increase its coach fares, and pursuant to such authorization its coach-class fares for the first time were increased to $11.70 effective March 28, 1951.

The Commission issued its Decision No. 45624, 50 Cal. P. U. C. 563, April 24, 1951, a copy of which decision appears as Appendix C attached to Western's Jurisdictional Statement. The order therein authorized California Central Airlines, United and Western to increase their intrastate one-way adult coach-class fares for transportation of passengers between the San Francisco Bay area airports and the Los Angeles area airports to $11.70 and directed these three air carriers to make reparation, wherever possible, to passengers paying coach fares between said airports in excess of the authorized fares. The effective date of the order was May 9, 1951. California Central Airlines, United and Western filed timely petitions for rehearing with the Commission, all of which petitions were denied by the Commission by decisions dated May 15, 1951.

In the meantime on May 9, 1951, Western, pursuant to Commission Decision No. 45624, supra, filed its revised tariff covering intrastate air coach-class fares between the Los Angeles area airports and the San Francisco Bay area airports, effective May 9, 1951. Likewise United and California Central Airlines filed revised tariffs covering such fares.

California Central Airlines upon denial of its petition for rehearing acquiesced in the order of the Commission and

indicated it would proceed with reparation, wherever possible.

June 14, 1951, United and Western filed petitions for writs of review, of the Commission Decision No. 45624, supra, with the California Supreme Court, S. F. No. 18426 and S. F. No. 18427, respectively. Both petitions were denied by the California Supreme Court by orders issued without opinion, filed August 2, 1951. On August 16, 1951, Western filed with the California Supreme Court a petition for rehearing of the order denying the writ of review and on August 30, 1951, the California Supreme Court denied this petition for rehearing by order again without opinion.

On October 26, 1951, both United and Western filed appeals from the orders of the California Supreme Court with the United States Supreme Court. If hearings be granted on these appeals this Commission will in due time move that the United States Supreme Court consolidate these appeals for hearing.

II. Statement of the Issues on Appeal

Western on page 12 of its jurisdictional statement has set forth two basic questions as follows:

(1) Has the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 U. S. Code 401 et seq.) pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

(2) Is the Order of the Public Utilities Commission of the State of California purporting to regulate the air coach tariff over an interstate segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of subsection 3 of Section 8, Article I of the Constitution of the United States?

We believe both of these questions to be nondefinitive statements of the true issues which are involved in this appeal.

Question (1) is so broad as to require the Court to consider both economic and safety regulation under the Civil Aeronautics Act. The order of the Commission, since it relates only to fares, is limited to economic regulation of air carriers.

Also question (1) as stated by Western would require the Court to consider whether the Civil Aeronautics Act precludes the Commission from regulating the intrastate fares charged intrastate passengers by a non-certificated carrier engaged in commercial air transportation wholly within the State of California and carrying only intrastate passengers. Admittedly Western is not such an air carrier, and as previously stated, California Central Airlines, the only such air carrier whose fares are regulated by the Commission order here under consideration, has acquiesced in its validity.

Western's Question (2) refers to an interstate segment of a Federally certificated interstate route. The route here involved is between the Los Angeles area and the San Francisco Bay area and hence is wholly within the State of California and not an interstate segment. Western carries on its coach flights both passengers whose journeys are wholly intrastate and passengers whose journeys from the Los Angeles area to the San Francisco Bay area are segments of interstate journeys.

The Commission wishes the Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The specific fare under consideration is an intrastate fare inasmuch as the $11.70 fare is for travel between airports within the State of California. However, this intrastate fare may be charged an interstate

passenger (i.e., one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey), as an integral part of an interstate fare, or it may be charged an intrastate passenger (i.e., one whose entire journey is within the State of California). The Commission takes the position that its order as set forth in Decision No. 45624, supra, pertains only and could pertain only to fares which are being charged to those passengers whose journeys between the Los Angeles area airports and the San Francisco Bay area airports are intrastate journeys and not integral parts of interstate journeys. Such fares are hereinafter referred to as intrastate fares.

We believe the following questions to be more definitive of the issues before the Court in this appeal:

(1) Has the Congress through the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 U. S. Code 401 et seq.) pre-empted the field of economic regulation of air carriers engaged in interstate commerce, or in the transportation of U. S. mail, or both, so as to preclude the Commission from regulating the intrastate fares charged intrastate passengers by such carriers for transportation between points in California?

(2) Does the order of the Commission regulating the intrastate fares charged intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I)?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Although the United States Supreme Court has not issued a decision specifically answering the above stated questions with respect to air carriers, this Court has considered substantially the same questions in cases involving other types of carriers and utilities and has clearly determined such issues in favor of the validity of the Commission's order. We propose to demonstrate that Western has raised no substantial Federal question by its attempted appeal.

A. *Preliminary Statement*

With respect to the general question of Commission jurisdiction over rates of air carriers, it is interesting to note that United has since November 28, 1931, submitted to this jurisdiction by having on file with the Commission either in its own name or that of a subsidiary or affiliate tariffs of its intrastate fares. Western has had tariffs of its intrastate fares on file with the Commission since June 21, 1945. Both Western and its subsidiary, Western Air Lines of California, Inc., acquiesced in Commission Decision No. 43932, 49 Cal. P. U. C. 494, which found that the Commission had authority under Article XII of the California Constitution to institute proceedings to determine the reasonableness of intrastate fares of air carriers and pursuant to such authority found that the one-way fares of $9.95 and $9.99 being assessed for airline coach-class service between Los Angeles and San Francisco had been shown to be reasonable.

The inconsistent positions taken by the petitioners are further clearly demonstrated by the fact that both United and Western filed applications with the Commission seeking approval of the $11.70 fare as an intrastate fare, and both petitioners pursuant to Commission Decision No. 45624, which is here under attack, have filed tariffs with the Com-

mission setting forth the $11.70 one-way adult fare for air-coach service between the Los Angeles area airports and the San Francisco Bay area airports.

United and Western are willing to take the benefit of Commission authorization of the increased fares but deny that the Commission has jurisdiction to exercise such authority. It is a rule of law that one may not approbate and reprobate at the same time, particularly where he accepts the benefit of the approbation. The actions of United and Western prove a clear recognition on their part (although they seek to deny it) of the lawful authority of the Commission to regulate their intrastate fares.

The Interstate Commerce Clause of the Constitution of the United States became effective in 1789, the Civil Aeronautics Act in 1938. For logical as well as historical reasons we prefer to discuss the issues outlined above in reverse order.

B. *The Order of the Commission Regulating the Intrastate Fares Charged Intrastate Passengers by Air Carriers Engaged Both in Intrastate and Interstate Commerce for Transportation Between Points in California Does Not Place Such a Burden on Interstate Commerce as to Constitute a Violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).*

The fact that Western is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the order of the Commission is concerned. The regulation of fares charged by air carriers requires no more uniformity than does the regulation of fares and rates of railroads, bus lines, truck lines, and telephone and telegraph utilities.

The speed of an airplane loses its significance when com-

pared to the speed of transmittal of a telephone or telegraph message. It is a matter of common knowledge that the separation of interstate and intrastate operations of telephone and telegraph utilities is much more difficult than the separation of the interstate and intrastate operations of passenger and freight carriers, including air carriers. However, such facts have not resulted in exclusion of state regulation of charges for intrastate telephone and telegraph messages.

It has long been held by the United States Supreme Court that until such time as the Congress preempts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation in so far as intrastate operations are concerned, even though their interstate operations are regulated by Federal authority.

Cooley v. *Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996;

Minnesota Rate Cases (1913), 230 U. S. 352, 57 L. ed. 1511;

Eicholz v. *Public Service Commission* (1939), 306 U. S. 268, 83 L. ed. 641;

Smith v. *Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. ed. 255;

Lindheimer v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 78 L. ed. 1182.

In the recent case of *Alabama Public Service Commission* v. *Southern Railway Company* (1951), 341 U. S. (Preliminary Print) 341, 345, 95 L. ed. Adv. Ops. 708, 711, the United States Supreme Court, speaking through Mr. Chief Justice Vinson, made the following statement regarding state regulation of intrastate transportation:

> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved

in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U. S. C. §§ 1, et seq. But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. • • • And Congress has since provided:

> " 'That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 U. S. C. § 1(17(a)).

"This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States,* 325 U. S. 507, 511, 89 L. ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts,* 308 U. S. 79, 84 L. ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The United States Supreme Court has held that the states may even regulate *interstate* commerce of a local nature until such time as the Congress has preempted the entire field of interstate commerce.

Kelly v. *Washington* (1937), 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13;

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission,* (1951), 341 U. S. (Preliminary Print) 329, 333, 95 L. ed. Adv. Ops. 673, 676.

The United States Supreme Court in upholding state regulation of direct sales of gas for consumptive use by a natural gas company which was engaged in interstate commerce, through the majority opinion delivered by Mr. Justice Minton, in the case of *Panhandle Eastern Pipe Line Co.*

v. *Michigan Public Service Commission*, (1951), 341 U. S. (Preliminary Print), 329, 333, 95 L. ed. Adv. Ops. 673, 676, went even further to state:

> "* * * In the absence of federal regulation, state regulation is required in the public interest. * * *"

C. *The Congress Through the Civil Aeronautics Act of 1938, As Amended (52 Stat. 977, 49 U. S. Code 401 et seq.) Has Not Pre-empted the Field of Economic Regulation of Air Carriers Engaged in Interstate Commerce, or in the Transportation of U. S. Mail, or Both, So As to Preclude the Commission from Regulating the Intrastate Fares Charged Intrastate Passengers by Such Carriers for Transportation Between Points in California.*

Section 1 (2) of the Civil Aeronautics Act (49 U. S. Code 401 (2)) defines "air carrier" as one engaged in "air transportation", and "air transportation" is defined in Section 1 (10) (49 U. S. Code 401 (10)) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

Air carrier economic regulation under Sections 401, 403 and 404 of the Civil Aeronautics Act (49 U. S. Code 481, 483 and 484) is limited to the regulation of "air transportation". The rates, fares and charges regulated by the Civil Aeronautics Board under these sections are "rates, fares, and charges for air transportation".

There is nothing in the Civil Aeronautics Act which gives the Civil Aeronautics Board jurisdiction over intrastate fares charged intrastate passengers by "air carriers", nor is there anything in the Act which prevents the states from exercising jurisdiction over such fares.

Even though the provisions of the Civil Areonautics Act were not clear in this regard, the United States Supreme Court has held that any doubt should be resolved in

favor of state power. We quote from the majority opinion of Mr. Justice Brandeis in *Arkansas Railroad Commission* v. *Chicago, R. I. & P. Co.* (1927), 274 U. S. 597, 603, 71 L. ed. 1224, 1228:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"

Although Section 406(b) of the Civil Aeronautics Act (49 U. S. Code 486(b)) permits the Civil Aeronautics Board in fixing reasonable rates for the transportation of mail by air to consider the need of the air carrier and its revenue from other sources, such section does not preclude state regulation of intrastate passenger fares. The California Public Utilities Commission is as duty bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty bound to fix just and reasonable interstate fares. There are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

Rosenhan v. *United States* (1942), 131 F. (2d) 932, cert. den. 318 U. S. 790, 87 L. ed. 1156, has previously been cited by Western as case authority to show that the Federal government has preempted the entire field of air carrier regulation. This case relates to the safety regulatory provisions of the Civil Aeronautics Act, however.

Federal regulation of the safety phase of the operations of air carriers is pursuant to Section 601 of the Civil Aeronautics Act (49 U. S. Code 551) which grants the Civil Aeronautics Board authority over "air commerce". Section 1 (3) of the Act (49 U. S. Code 401 (3)) defines "commerce" to mean "interstate, overseas, or foreign air com-

merce or transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign commerce".

A review of the definition of "air commerce" and the safety provisions of the Civil Aeronautics Act clearly demonstrates that the Congress knows how to use language to extend Federal regulation to intrastate activities when it desires to do so.

Western's appealing language on page 13, line 18 through page 15, line 28 of its Jurisdictional Statement had better be directed to the Congress of the United States than to the Supreme Court of the United States. Indeed similar language has undoubtedly already been directed to the Congress and its Congressional committees during the consideration of the numerous bills presented to the Congress *which have sought to extend Federal economic regulation to intrastate operations of air carriers.*

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress—Lea-Bailey Aviation Bill introduced as H. R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill, S. 541; Lea Bill, H. R. 3383.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944 N. A. R. U. C. Proceedings 221
1945 N. A. R. U. C. Proceedings 299
1946 N. A. R. U. C. Proceedings 210
1947 N. A. R. U. C. Proceedings 128
1948 N. A. R. U. C. Proceedings 69
1949 N. A. R. U. C. Proceedings 166
1950 N. A. R. U. C. Proceedings 106

For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer Western to the paragraphs appearing under the heading "Federal Jurisdiction" commencing on page 8 of H. R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H. R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads in part as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill".

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H. R. 3420, as reported by the committee, because (1) it destroys States' rights, * * *
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* [emphasis added] all rights of the States:
>
> "(1) *To regulate intrastate commerce by air,* including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not *take away* the rights of the States. H. R. 3420 was never enacted into law.

"Appropriate Areas of State Economic Regulation" by Frederick G. Hamley (1946), 11 Law and Contemporary Problems 488, is an excellent article setting forth views in support of the continuance of state regulation of air carriers.

Western's Jurisdictional Statement presents a bold attack upon our Federal form of government. This is not the first time that an attempt has been made to argue contrary to the spirit and the principle upon which our Federal form of government was founded. But the Supreme Court of the United States has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for the Supreme Court of the United States, clearly reiterated these principles in the case of *Davies Warehouse Co.* v. *Bowles* (1944), 321 U. S. 144, 153-155, 88 L. Ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> * * * * * * *
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. * * *
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden

but one implied by the terms of the legislation when viewed against the background of our form of government."

D. *Western Can Comply with the Reparation Order of the Commission without Violating the Provisions of Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)).*

Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)) in part provides:

> "(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; * * *".

This Court will note that the terms used therein are "air carrier" and "air transportation" as defined in the Act and not "air commerce". Hence the section applies to interstate and not to intrastate fares. Concededly the order of the Commission applies only to intrastate fares.

Even though Western does find itself in a dilemma, it has no right to complain, as its own voluntary actions have created the situation. Air carriers, like other common carriers, advisedly should obtain all the necessary authorizations from the proper regulatory bodies, both State and Federal, before placing into effect an increase in fares.

IV. Conclusion and Motion to Dismiss or Affirm

We respectfully submit that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling Western to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California.
November 8, 1951.

Respectfully submitted,

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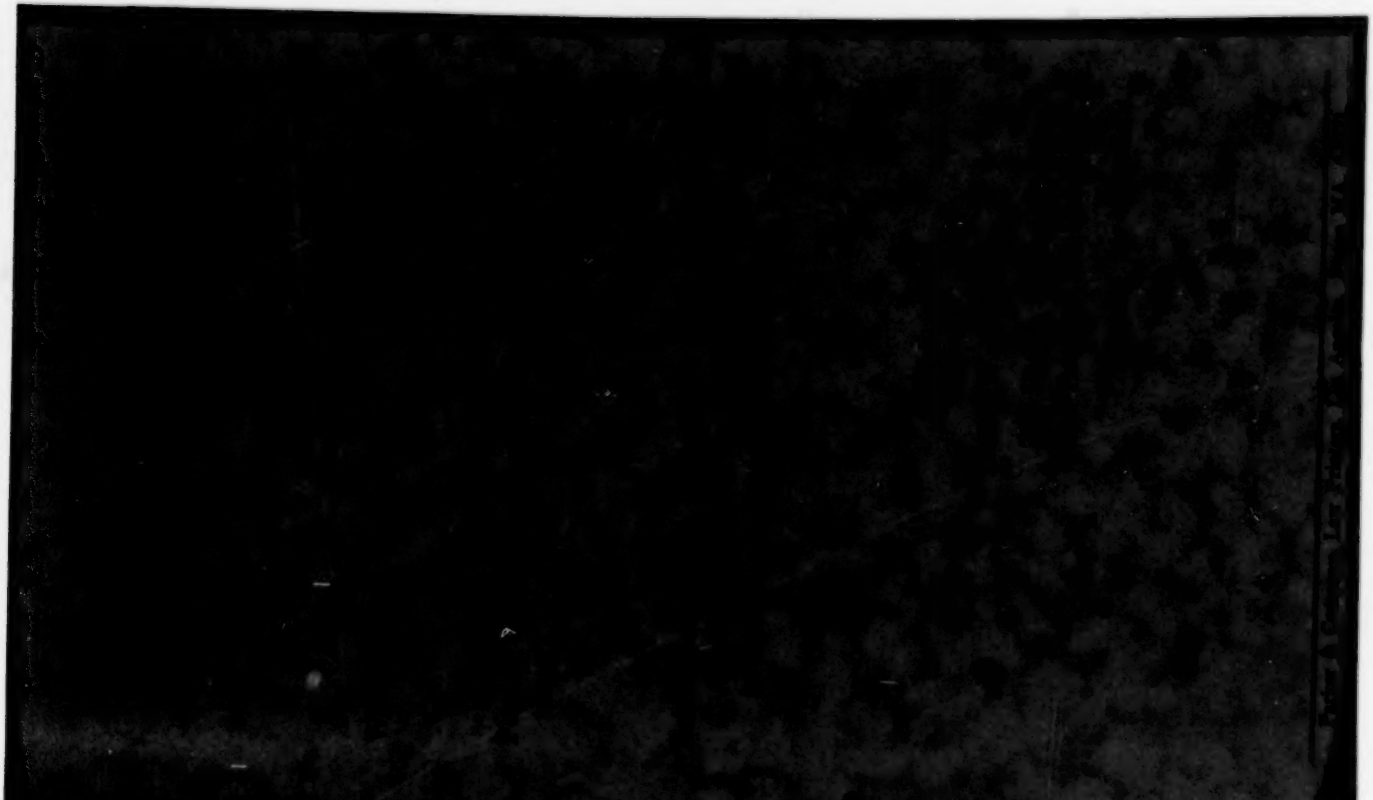

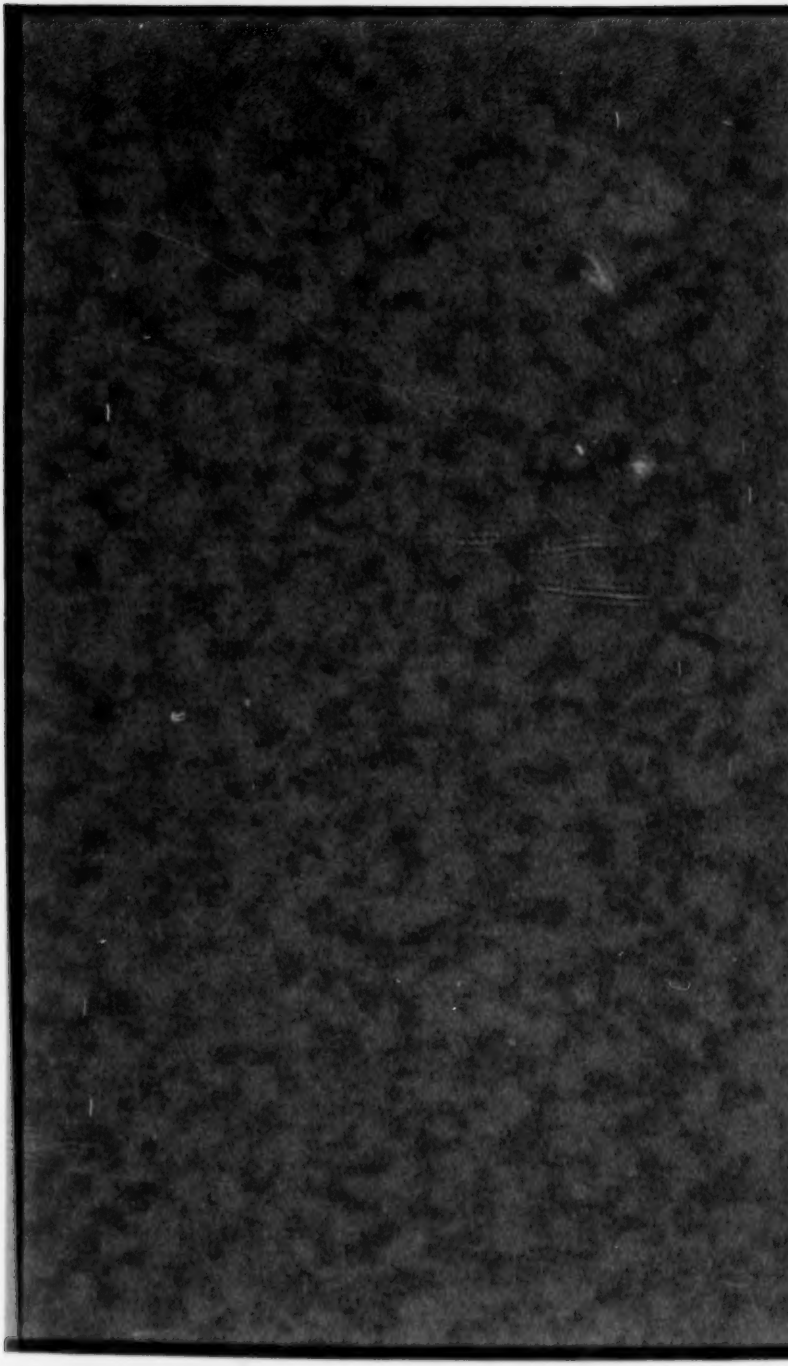

SUBJECT INDEX.

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IN THE

Supreme Court of the United States

October Term, 1951.
No.....

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Brief of Appellant Under Rule 12(3) in Opposition to Appellee's Motion to Dismiss or Affirm Included in Statement Against Jurisdiction.

Preliminary Statement.

The basic point that this Court is asked to decide is the extent to which, if at all, states have the power to exercise any control over interstate air carriers serving the public. The question is easy to state but the answer is not simple. Only this Court can shed light on the somewhat confused status of the law.

Appellee rests its motion to dismiss the appeal or affirm the orders of the California Supreme Court on the single ground that no substantial federal question is presented by the appeal.

Appellant believes that the answer of this Court to the basic question should be that the states have no control

over the interstate or intrastate operations, safety or economics of commercial air carriers. But an unwanted answer is better than no answer. Accordingly, the mission of this brief will be to show that the basic question must be answered, thus demonstrating that it is substantial, rather than placing emphasis on what the answer should be. That will come later.

I.

The Basic Question Involved Is Substantial.

A. Uncertainty Exists With Respect to the Extent of the Power, if Any, Which States May Exercise Over Air Carriers.

The very existence of this proceeding exposes the confusion that prevails over the issue of state control versus Federal control of commercial air carriers.

The record discloses that Appellant increased its air-coach tariff between Los Angeles and San Francisco, California, from $9.95 to $11.70, effective March 1, 1951, pursuant to the request of the Civil Aeronautics Board and in compliance with the Civil Aeronautics Act. The order of Appellee which is being challenged approved the increase effective May 9, 1951, rather than March 1, 1951, and ordered restitution wherever possible of the excess between $9.95 and the $11.70 charged by Appellant between March 1 and May 9, 1951.

If the Civil Aeronautics Board under the Civil Aeronautics Act has control over the tariffs charged by Appellant for carrying passengers between intrastate points on its interstate routes, Appellant would be subject to the criminal penalties of Section 902 of the Civil Aeronautics Act (49 U. S. Code 622) if it made a single refund in response to Appellee's order. If Appellee's order

be valid and Appellant should fail to make restitution wherever possible of the "excess" tariff charged, Appellant may be subject to a penalty of not less than $500.00 nor more than $2,000.00 for each offense, imposition of which penalty is threatened by Appellee in unveiled language appearing in its order.

It is not right that Appellant should have to undertake the burden of determining which putative master it should obey, and speculating on which, if either, might be disinclined to exact the penalty for disobedience. Even though Appellant were to choose wisely in this instance, if left to its own devises, the confusion would not be removed. Appellant, along with all other air carriers similarily situated, will not know which order to fulfill and which order to reject as conflicting orders arise in the future.

Although the specific point here in dispute involves only the question of control over passenger tariffs charged by an air carrier for the transportation of persons between intrastate points on an interstate air route, the basic question at issue involves much more and connotes grave disruptions to the economic welfare of the American flag air transportation industry.

Appellee seems to concede without too much reluctance, possibly because resistance would be quite futile, that the states have no right to interfere with *safety* matters concerning air carriers. But Appellee insists that neither the Civil Aeronautics Act nor the commerce clause of the Federal Constitution imposes a barrier against complete control by the states relating to the intrastate operations of air carriers from the standpoint of *economic* matters.

Economic regulation is by no means limited to controlling tariffs. Economic matters, as distinguished from safety matters, in air transportation include the issuance,

modification and abandonment of Certificates of Convenience and Necessity (49 U. S. Code 482). They include the rates to be paid by the Post Office Department for the carriage of mail by air (49 U. S. Code 486). They include the type of reports to be filed, disclosure of stock ownership, form of accounts and inspection of accounts and property (49 U. S. Code 487). They also include matters relating to consolidations, mergers and acquisitions of control (49 U. S. Code 488), interlocking relationships (49 U. S. Code 489), and pooling agreements (49 U. S. Code 492), without exhausting all of them.

If the Civil Aeronautics Act and the commerce clause do not prohibit the states from controlling passenger tariffs charged by air carriers for transportation between intrastate points on interstate routes, there would be no prohibition against state control of Certificates of Convenience and Necessity covering intrastate segments. If the State of California acting through Appellee have the power to grant or deny to Appellant a Certificate of Public Convenience and Necessity to operate between Los Angeles and San Francisco, California, that would include the power to block effective issuance by the Civil Aeronautics Board of an interstate air route between Los Angeles, California, and Seattle, Washington, via Oakland and San Francisco, California, and Portland, Oregon, which represents Appellant's Certificate of Convenience and Necessity for Route 63 issued by the Civil Aeronautics Board. Lacking the full strength of the Los Angeles-San Francisco intrastate segment, the Los Angeles-Seattle interstate route would provide but little public service.

If the State of California acting through Appellee have the power to block a merger of Appellant with some other air carrier because the merger would involve Appellant's

operation between Los Angeles and San Francisco, the Civil Aeronautics Board's control over mergers of air carriers would be stultified, if not nullified.

It is not known, and has not been known since the Civil Aeronautics Act was passed in 1938, with any degree of certainty the extent to which, if at all, the various states have control over these economic matters which are so important to the welfare of the air transportation industry. The basic question involved on this appeal concerns these matters and the answer pronounced by this Court will remove the uncertainties.

B. Dual Control of the Airline Industry Would Be Disruptive.

It is not to be denied that conflicting orders addressed to an air carrier by separate agencies with neither agency having authoritative primacy would create an untenable and intolerable condition in the air transportation industry. This is so whether the conflicting orders concern safety, and therefore involve lives, or concern economic matters, and therefore involve only dollars. Indeed, the latter would have a direct impact on the efficiency of the carrier's operation, and if allowed to continue an inefficient operation will become a dangerous operation.

It is no answer to say, as Appellee has said, that a state agency is as duty-bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty-bound to fix just and reasonable interstate fares, and that there are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

A state agency in the highest good faith might consider an intrastate air tariff of 2¢ a mile just and reasonable and the highest court of that state in like good

faith might agree. Should the Civil Aeronautics Board in the highest good faith conclude that 6¢ a mile[1] is a reasonable rate and should this Court agree, a high block would be placed in the road of an efficient operation by the air carriers directly concerned. Nor would it matter that both courts acting independently were to rule that the state order applied only to intrastate traffic and the Federal order only to interstate traffic. Even though it were possible to screen out intrastate passengers and to prevent interstate passengers from making the trip by segments on separately purchased segment tickets, an impossible situation would exist if a Los Angeles-Seattle passenger had to pay three times as much to fly over the Los Angeles-San Francisco segment of his interstate flight as the Los Angeles-San Francisco passenger would pay for his intrastate flight. If this were multiplied by the number of times that the same situation could exist, should all forty-eight states exercise similar power in like fashion, the impact on the air transportation industry would not be responsive to the public interest.

Dual control over air tariffs would prevent the maintenance of a uniform national rate structure and could lead to direct violation of Section 404(b) of the Civil Aeronautics Act (49 U. S. Code 484), which reads:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference

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[1]The prevailing first-class air passenger rate nationally averages approximately 6¢ per mile.

> or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Appellee will argue that this section of the Act refers only to "air transportation" and that this term is defined in Section 1(10) (49 U. S. Code 401), to mean interstate, overseas or foreign air transportation or the transportation of mail by aircraft, and thus that the anti-discrimination provision was not intended by Congress to apply to intrastate matters.

Such an argument would do little credit to the intelligence of Congress. If a person who travels by air between Los Angeles and San Francisco is not a person within the meaning of that section, or if Los Angeles and San Francisco are not ports, and the intervening area a locality within the meaning of the section, and if the traffic between Los Angeles and San Francisco does not come within the purview of any "description of traffic in air transportation" the section will be of little value in maintaining reasonable standards in the air transportation industry. And although San Francisco-Los Angeles may be the most important intrastate air segments in the United States, it is by no means the only one.

C. Dual Control Would Divest the Board of Its Air Mail Rate Authority.

Perhaps the most important element which exposes the substantial nature of the basic question raised by this appeal concerns air mail rates.

Section 406(a) of the Act (49 U. S. Code 486), directs the Board to fix and determine the fair and reasonable rates of compensation for the transportation of mail by aircraft. Section 406(b) sets forth the factors which the Board shall take into consideration in determining the mail rate in each case, including:

> ". . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, *together with all other revenue of the air carrier,*[2] to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The term "all other revenue" is not all-embracing, as it does not include income from matters not directly related to the carriers' air transportation operations, but

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[2]Emphasis in quoted material added throughout unless otherwise noted.

manifestly it does include tariff derived from the carriage of persons and property between points within a single state.

If the several states have control of intrastate air tariffs the various state agencies and not the Civil Aeronautics Board necessarily will become the final arbitrators of what rate the Post Office Department must pay for the carriage of mail. This cannot be disputed, nor can it be cast aside with the bland declaration that each state would be duty-bound to fix just and reasonable intrastate tariffs.

If a particular state agency, being concerned largely with its own citizens, determine that intrastate tariffs should be less per mile than the standard interstate tariff approved by the Civil Aeronautics Board, necessarily every air carrier operating intrastate segments within that state would derive less passenger revenue than would be the case otherwise, with the result that the Board would be under compulsion to offset the diminished passenger revenue from intrastate tariffs by increasing the mail rate. Congress could not have intended this to be so.

That the basic question involved on this appeal is substantial and of great importance to the air transportation industry is scarcely open to fair challenge. It remains only to be seen whether there is merit to the points of law which will be urged by Appellant in support of the answer Appellant believes to be legally correct.

II.

The Legal Points Which Will Be Urged by Appellant Have Merit.

A. Preface.

Appellant concedes that no matter how important the question involved may be to it and to the air transportation industry, Appellee's motion to dismiss or affirm would be in order unless the legal principles to be urged in support of the answer sought by Appellant have merit. Since it is thought that the need for this brief is simply to reveal that the main question is substantial and that the supporting legal points have real merit, the effort will not necessarily be made to present the law under color of finality. That will be done in the brief which will be filed under Rule 27.

The basic point urged by Appellant is that the states have no power to interfere with the operations of air carriers, either with respect to safety matters or economic matters. This basic point splits into two—(1) by the Civil Aeronautics Act the Congress has preempted the field, and (2), if that be not so, the commerce clause of the United States Constitution of itself bars interference by the states.

It is axiomatic that under our system the Federal Government has exclusive control of matters pertaining to interstate commerce, with the states retaining exclusive control of local matters. Another maxim is that state control of local matters must yield when the exercise of that control would be a burden upon interstate commerce. It is in this phase—intermingling and overlapping—when the line sometimes becomes fuzzy and judicial interpretation becomes essential.

The extent, if any, to which states may exercise power over matters of commerce in a given circumstance does not admit of measurement by slide rule tactics. In each instance all of the factors must be weighed and the overall picture surveyed. The point was well expressed by Mr. Justice Black in *Hines v. Davidowitz,* 312 U. S. 52:

> "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of State laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions; conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." pp. 67-8.

* * * * * * * *

> "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." p. 70.

The same principle—lack of a formula—applies when a state act intrudes on a United States constitutional provision absent legislative implementation. This language was used by Mr. Justice Reed in *Morgan v. Commonwealth of Virginia*, 328 U. S. 373:

> "The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.
>
> "In the field of transportation, there have been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce." pp. 377-9.

First, Appellant will show that there is merit to the legal argument that by the Civil Aeronautics Act Congress pre-empted the entire field of commercial air transportation regulation, both safety and economic. Next, Appellant will show that even though the Civil Aeronautics Act should be held not to occupy the field, sound merit exists in the legal argument that the commerce clause of the United States Constitution of itself bars interference by the states.

B. The Argument That the Civil Aeronuatics Act Preempts the Field of Commercial Air Transportation Has Merit.

1. Lack of Specific Language in the Act Is Immaterial.

At the outset it is admitted that the Civil Aeronautics Act contains no direct language that the Civil Aeronautics Board has exclusive control of either the safety factors or the economic factors pertaining to air transportation. Nor does the Act provide in so many words that the states shall not interfere.

Appellee has conceded that the Civil Aeronautics Act occupies the entire field of *safety* with respect to air transportation with this declaration in its Statement in Opposition:

> "A review of the definition of 'air commerce' and the safety provisions of the Civil Aeronautics Act clearly demonstrates that the Congress knows how to use language to extend federal regulation to intrastate activities when it desires to do so."

The concession of Appellee is commendable. It is believed, however, that this concession is based more on

the fact that "under the circumstances of this particular case, (California's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" concerning safety regulation in air transportation, to paraphrase the *Hines* case, rather than on the language used by Congress in the Civil Aeronautics Act.

The absolute necessity of having a single master with respect to safety regulations in air transportation—far and above any form of ground transportation—is so overwhelmingly manifest that no matter what language might have been used in the Civil Aeronautics Act no one would be heard to argue that the several states could exercise independent control over safety regulations of intrastate air transportation. If each state established its own levels at which aircraft could fly when on instruments, there would be no blind flying. There is no need to multiply this example.

If this Court were called upon to consider the validity of a state law impinging on the exclusiveness of the Board's control of safety matters in air transportation, every expression noted in the *Hines* case—conflicting, contrary to, repugnance, irreconcilability and interference, to state five of the ten—could be employed. Nonetheless, the language in the Act with respect to pre-emption of the field of safety is by no means as convincing or compelling as the circumstances themselves.

Section 601(a) of the Act (49 U. S. Code 551) reads in part:

> "The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—"

various safety standards and rules which are quite all-embracing. This power is confined to flight in air commerce.

Section 1(3) of the Act (49 U. S. Code 401(3)), defines air commerce in this manner:

> "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Mail is carried by air between points in a single state —Los Angeles to San Francisco, for example. Operation of an aircraft within the limits of any civil airway may be entirely within a single state—again Los Angeles to San Francisco, for example. Careless operation of an aircraft flying between Los Angeles and San Francisco might endanger the safety of an interstate flight between Los Angeles and Seattle. So Congress must have, and if it did not it should have, intended to exclude states from interfering with safety matters in any form of air transportation. But Congress did not say so in so many words.

The difference between the words used in the Act respecting safety factors and those used respecting economic factors is very thin and far from sufficient to hold categorically, as Appellee concedes, that safety matters have been pre-empted, but that, as Appellee contends, economic matters have not been.

Section 403(a) of the Act (49 U. S. Code 483(a)), provides that every air air carrier shall file with the Board

tariffs showing all rates for "air transportation" between points served by it. Section 1(10) of the Act (49 U. S. Code 401(10)) reads: "'Air transportation' means interstate, overseas or foreign air transportation or the transportation of mail by aircraft." Section 1(21) defines "interstate air transportation" as the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between a place in one state to a place in another state, among other combinations. These words standing alone and strictly construed could be held to exclude intrastate operations. But a broader analysis produces an entirely different reflection on the Congressional intent.

Section 403(a) requires that the tariffs show all rates for air transportation between points served by the carrier. This means all points, not just those that are interstate. Section 403(b) provides that no air carrier shall charge "different compensation for air transportation, *or for any service in connection therewith,* than the rates . . . specified in its currently effective tariffs;". Even though it could be argued that the "points" referred to in Section 403(a) were intended to be interstate only, intrastate air transportation by an interstate air carrier necessarily is "service in connection" with interstate air transportation.

There is no possibility of reading into Section 403 any conclusion other than the conclusion that Congress intended to vest in the Civil Aeronautics Board complete control over the tariffs of air carriers. There is no room for serious contention that Congress intended to leave to the several states the power to determine what tariffs

interstate air carriers should charge for air transportation between points located within the borders of a single state.

Section 401 of the Act (49 U. S. Code 481) covers the issuance, modification, suspension, revocation, transfer and abandonment of Certificates of Public Convenience and Necessity for air routes. Subsection (f) of that section states that "Each certificate under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered." Though the term "air transportation" is used, this declaration necessarily must give the Board control over intrastate segments of the certificates as it is doubted that a single domestic interstate certificate has been issued by the Board under the Act which does not contain at least one intrastate segment.

If the certificates issued by the Board do not confer upon the carrier the right to serve the traffic between intermediate points which are located within a single state, the value to the public of the certificate would be reduced sharply and the Board's power to compel the carrier to provide safe and adequate service at just and reasonable rates (49 U. S. Code 484) would be minimized considerably.

So it is that Section 407 of the Act relating to accounts, records and reports, Section 408 relating to consolidations and mergers, and Section 412 relating to pooling and other agreements would be stripped of vitality if they applied only to the strictly interstate operations of air carriers.

It is not necessary that the Civil Aeronautics Act in so many words recite that it is all-embracing to the exclu-

sion of state interference. Mr. Chief Justice Marshall had this to say in *Sturges v. Crowninshield,* 17 U. S. 122:

> "Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." p. 193.

Equally effective language was used by Mr. Justice Jackson in *Bethlehem Steel v. New York Labor Relations Board,* 330 U. S. 767, in which these statements appear:

> "Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting. *Napier v. Atlantic Coast Line R. Co.,* 272 U. S. 605, 71 L. ed. 432, 47 S. Ct. 207.
>
> "In determining whether exclusion of state power will or will not be implied, we well may consider the respective relation of federal and state power to the general subject matter as illustrated by the case in hand. These companies are authorized to do business in New York State, they operate large manufacturing plants in that state, they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state,

are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion. *Cf. Hines v. Davidowitz,* 312 U. S. 52, 66, 85 L. ed. 581, 586, 61 S. Ct. 399.

"Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the Shreveport Case, *Congress can reach admittedly local and intrastate activities 'having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.'* " pp. 772-3.

* * * * * * * *

"However, the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . . When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own . . ." p. 773.

* * * * * * * *

2. COMMINGLING OF INTRASTATE AND INTERSTATE MATTERS DOES NOT PRECLUDE EXCLUSIVE FEDERAL CONTROL.

The fact that there is a commingling of intrastate and interstate transactions in no wise detracts from the Board's exclusive power. In fact, there are but few interstate activities that are completely divorced from some intrastate functions. If the intrastate activities can be segregated from the interstate activities, and if the intrastate activities do not impede the interstate functions, dual controls are permissible. But when the commingling cannot be unraveled, or when state control of the intrastate transactions will trespass on Federal control of the interstate transactions, state control must yield.

Mr. Justice Hughes had this to say on the point in *Houston East and West Texas Railway v. U. S.*, 234 U. S. 342:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that

arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control." pp. 350-351.

* * * * * * * *

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field." pp. 351-352.

* * * * * * * *

"We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. *That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable;* and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with

interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflect injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden." p. 354.

* * * * * * * *

"We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But *it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters,* and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control." p. 360.

Added force to the argument that the Civil Aeronautics Act precludes state interference is found in the words of Mr. Chief Justice Hughes reported in *Currin v. Wallace,* 306 U. S. 1:

"The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. . . . Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale." p. 11.

The special circumstances attending the air transportation industry coupled with the wording of the Civil Aeronautics Act bring these cases into play. It cannot be said with conviction that Appellant's legal argument that the Civil Aeronautics Act occupies the entire field of commercial air transportation—economic as well as safety—is lacking in merit.

Certainly it cannot be claimed that the point here contended for by Appellee is so clear that this case should be dismissed or affirmed in summary fashion. The air transportation industry is entitled to a decision of this Court resolving the issue one way or another with sufficient clarity and preciseness to enable the members of the industry to plan their operations with knowledge of the circumstances, if any there be, under which orders of state agencies must be obeyed and conflicting orders of the Civil Aeronautics Board may be ignored with impunity.

C. The Argument That the Commerce Clause of the United States Constitution, Without Aid From the Civil Aeronautics Act, Excludes Any State Control Over Air Carriers Has Merit.

It is not conceded for an instant that the Civil Aeronautics Act has not pre-empted the entire field of air transportation. But should it be the ruling of this Court that Congress did not intend the Civil Aeronautics Act to pre-empt the field, then the commerce clause of itself establishes the needed barrier against state intervention.

The Federal Government has exclusive control over interstate commerce. States may not impose burdens on this commerce whether or not Congress has chosen to speak.

Mr. Justice Sutherland in *Missouri ex rel. Barrett v. Kansas National Gas Co.*, 265 U. S. 298, upholds Mr. Justice Hughes' words in the *Minnesota Rate Cases* in this language:

> "In Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 396, 57 L. ed. 1511, 1540, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, Mr. Justice Hughes, speaking for the court, said: 'If a state enactment imposes a *direct burden* upon interstate commerce, it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which, in the absence of Federal regulation, should be free.' The question is so fully discussed in that case that nothing beyond its citation is required." pp. 307-8. (Emphasis included.)

More recently Mr. Chief Justice Stone in *Southern Pacific Company v. Arizona*, 325 U. S. 761, confirmed the principle in this language:

> "But ever since Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, *or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.* Cooley v. Port Wardens, *supra* (12 How. (U. S.) 319, 13 L. ed. (1004); Leisy v. Hardin,

135 U. S. 100, 108, 109, 34 L. ed. 128, 132, 10 S. Ct. 681, 3 Inters Com. Rep. 36; Minnesota Rate Cases (Simpson v. Shepard) *supra* 230 U. S. 399, 400, 57 L. ed. 1541, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18); Edwards v. California, 314 U. S. 160, 176, 86 L. ed. 119, 126, 62 S. Ct. 164. Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, Brown v. Maryland, 12 Wheat. (U. S.) 419, 447, 6 L. ed. 678, 688; Minnesota Rate Cases (Simpson v. Shepard) *supra* (230 U. S. 399, 400, 57 L. ed. 1541, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18); Pennsylvania v. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132, 43 S. Ct. 658, 32 A. L. R. 300; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 522, 79 L. ed. 1032, 1037, 55 S. Ct. 497, 101 A. L. R. 55; South Carolina State Highway Dept. v. Barnwell Bros. *supra* (303 U. S. 185, 82 L. ed. 738, 58 S. Ct. 510); or upon the presumed intention of Congress, where Congress has not spoken, Welton v. Missouri, 91 U. S. 275, 282, 23 L. ed. 347, 350; Hall v. De Cuir, 95 U. S. 485, 490, 24 L. ed. 547, 548; Brown v. Houston, 114 U. S. 622, 631, 29 L. ed. 257, 260, 5 S. Ct. 1091; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 482, 31 L. ed. 700, 705, 706, 8 S. Ct. 689, 1062, 1 Inters. Com. Rep. 823; Leisy v. Hardin, *supra* (135 U. S. 109, 34 L. ed. 132, 10 S. Ct. 681, 3 Inters. Com. Rep. 36); Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 559, 560, 35 L. ed. 572, 575, 576, 11 S. Ct. 865; Bren-

nan v. Titusville, 153 U. S. 289, 302, 38 L. ed. 719, 723, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 212, 38 L. ed. 962, 966, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649; Graves v. New York, 306 U. S. 466, 479, note, 83 L. ed. 927, 932,note, 59 S. Ct. 595, 120 A. L. R. 1466; Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, the result is the same." pp. 767-8.

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, with out the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. Cooley v. Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996, *supra;* Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 S. Ct. 564; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 546, 59 L. ed. 350, 353, 35 S. Ct. 158, L. R. A. 1915F 792, P. U. R. 1915A 231; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 488, 62 L. ed. 419, 421, 38 S. Ct. 178, L. R. A. 1918C 535, P. U. R. 1918B 602; St. Louis & S. F. R. Co. v. Public Serv. Commission, 254 U. S. 535, 537, 65 L. ed. 389, 391, 41 S. Ct. 192, P. U. R. 1921B 504; Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 10, 73 L. ed. 147, 152, 49 S. Ct. 1; Gwin, White & Prince v. Henneford, 305 U. S. 434, 441, 83 L.

ed. 272, 277, 59 S. Ct. 325; McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 84 L. ed. 683, 60 S. Ct. 504." p. 769.

The very nature of air transportation, relatively new, fast and fast growing, requires the removal of all needless impediments to the free flow of its operations. Even though Congress had remained silent forty-eight different sets of safety regulations for air transportation would be an impossible burden on interstate commerce by air. Forty-eight conflicting sets of economic regulations would make it just as impossible for air carriers to conduct an efficient and safe air transportation system in interstate commerce.

But Congress has spoken wisely and effectively by means of the Civil Aeronautics Act. So speculation need not be indulged concerning what might have happened to the still young but important air transportation industry had there not been a central guide.

The Civil Aeronautics Board has proved its ability to guide and control the air transportation industry and the states have recognized that at least there was grave doubt about their right to interfere in any phase of the industries operations, otherwise this case would not be the test case on the subject.

Clearly, the argument that the commerce clause will not brook interference by the states with the operations of air carriers, regardless of any limitations in the Civil Aeronautics Act, has ample merit to invite the attention of this Court.

Conclusion.

The issues raised by this appeal are more than substantial, they are crucial to the well-being of the American flag air transportation industry and to the flying public.

The legal arguments which will be made in support of Appellant's claim that the Civil Aeronautics Act has preempted the entire field and that even without the benefit of that Act the commerce clause of the United States Constitution bars all significant state interference are sufficiently sound to justify a denial of Appellee's motion to dismiss or affirm.

Los Angeles, California.
December 3, 1951.

Respectfully submitted,

HUGH W. DARLING,
Attorney for Appellant.

Certificate of Service.

I, George G. Gute, an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Appellant Western Air Lines, Inc., certify that on this date I will have caused to be mailed copies of the within Brief to Everett C. McKeage, Esquire, General Counsel for Appellee Public Utilities Commission of the State of California, with postage prepaid, addressed to 514 State Building, San Francisco 2, California.

Los Angeles, California.
December 3, 1951.

GEORGE G. GUTE

JANUARY 7, 1952.

Per Curiam Decision.

No. 464. UNITED AIR LINES, INC. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA; and

No. 465. WESTERN AIR LINES, INC. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Appeals from the Supreme Court of California. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE BURTON are of the opinion probable jurisdiction should be noted. *Oscar A. Trippet* and *Paul M. Godehn* for appellant in No. 464. *Hugh W. Darling* for appellant in No. 465. *Everett C. McKeage* for appellee.